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No. _____

IN THE

Supreme Court of the United States

October 1990 Term

REHAB AMER and AHMED AMER,

Petitioners,

v.

DEPARTMENT OF SOCIAL SERVICES,

Respondent.

On Writ of Certiorari To
the Court of Appeals of the State of Michigan

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER PARENTS, INCLUDING THE PETITIONERS, ARE PERMANENTLY DEPRIVED OF PARENTAL RIGHTS TO THEIR CHILDREN WITHOUT DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IF:

1. THE TRIAL COURT TERMINATES PARENTAL RIGHTS RELYING ON THE FINDINGS OF A DIFFERENT JUDGE RENDERED IN A PRIOR HEARING AT WHICH A PREPONDERANCE OF THE EVIDENCE IS SUFFICIENT FOR FINDINGS, RATHER THAN THE CLEAR AND CONVINCING STANDARD REQUIRED BY *SANTOSKY V. KRAMER* IN PERMANENT TERMINATION PROCEEDINGS;

2. THE TRIAL COURT TERMINATES PARENTAL RIGHTS BASED EXCLUSIVELY AND PRESUMPTIVELY ON THE REFUSAL TO CONFESS TO INTENTIONALLY HARMING A CHILD PRIOR TO A CLEAR AND CONVINCING FINDING THAT THE PARENTS INTENTIONALLY HARMED THE CHILD.

3. THE TRIAL COURT TERMINATES PARENTAL RIGHTS DESPITE A PREPONDERANCE OF THE EVIDENCE, INCLUDING TESTIMONY OF THE COURT'S OWN EXPERTS THAT TERMINATION OF PARENTAL RIGHTS WAS UNWARRANTED.

4. INVOLUNTARY TEMPORARY FOSTER CARE IS OF UNLIMITED DURATION BASED UPON A MERE PREPONDERANCE OF THE EVIDENCE WHICH AFTER TWO YEARS SHIFTED THE BURDEN OF PROOF TO THE PARENTS.

II. WHETHER THE REFUSAL TO PROVIDE SERVICES TO EFFECTUATE REUNIFICATION OF THE FAMILY DURING TEMPORARY FOSTER CARE, AND THE ABSENCE OF A GOOD FAITH PLAN FOR REUNIFICATION VIOLATES FEDERAL STATUTES AND REGULATIONS APPLICABLE TO FOSTER CARE.

TABLE OF CONTENTS[1]

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

APPENDIX viii

OPINIONS BELOW 1

JURISDICTION OF THE UNITED STATES SUPREME COURT 2

DATES OF LAST OPINIONS OF THE COURTS BELOW 2

FEDERAL LAW INVOLVED 2

RAISING THE FEDERAL QUESTIONS BEFORE THE MICHIGAN COURT 2

REASONS FOR GRANTING CERTIORARI 3

INTRODUCTION 4

STATEMENT OF THE CASE 5

- Permanent Termination Hearing 5
- Brief Summary of Two Hearings Prior To Termination 6
- First Adjudication — More Detailed 8
- Second Adjudication — More Detailed 10
- Judge Barsamian Enters the Case 12

[1]Mohammed Ali Amer, Suehier Ahmed Amer, and Zinabe are parties to this proceeding and are represented by William E. Ladd.

Page

The Decision of Permanent Termination 13

Expert Testimony Opposed to Termination 15

No Efforts to Reunite the Family 16

Evidence Favoring Termination: 17
Refusal to Confess as Clear and Convincing Evidence for Termination

The Michigan Court of Appeals Opinion 20

How Did Samier Die? 21

ARGUMENTS FOR ALLOWANCE OF THE WRIT 21

A Fundamental Right 22

Clear and Convincing 23

Irrebuttable Presumptions 25

Confession and Fifth Amendment 25

The Michigan Statutory Scheme for Terminating Parental Rights was Unconstitutional on its Face 28

The Respondents Violated Federal Statutes with Respect to Foster Care 29

The Probate Court Displayed Bias and Prejudice 30

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: Page

Baltimore City Department of Social Services v. Bouknight, 110 S. Ct. 900 (1990) 28

Colorado v. New Mexico, 467 U.S. 310 (1984) 24

Cruzan v. Director, Missouri Department of Health, 101 S.Ct. 2841 (1990) 24

State Department of Human Services v. L.D., 658 S.W.2d 112 (Tenn. Ct. App. 1983) 23

Dutchess County Dep't. of Soc'l. Serv. ex rel. T.G., v. Mr. G., 141 Misc.2d 641, 534 NYS 2d 64, 69-70 (Fam. Ct.1988) 26, 27

Elmer v. Lucas County Children's Serv. Bd., 36 Ohio App. 3d 241, 523 NE 2d 540 (1987) 23

Fisher v. Dist. Court, 424 US 382 (1976) 24

Francis v. Franklin, 471 U.S. 307 (1985) 25

Griswold v. Connecticut, 381 U.S. 479 (1965) 24

In re J.W., 415 N.W.2d 879 (Minn. S.Ct. 1987) 27

Jacobs v. Smith, 433 Mich 24, 444 N.W. 2d 789 (1989) 23

In re Jessica B., 207 Cal. App. 3d 504, 254 Cal Reptr 833 (1989) 27

Page

In re Lay,
43 Ohio App. 3d 78, 539 NE 2d 664 (1987) 23

Lefkowitz v. Cunningham,
431 U.S. 801 (1977) 26

Lehman v. Lycoming County Children's Services Agency,
458 U.S. 502 (1982) 3

In re Martin,
167 Mich App. 715, 423 NW2d 327 (1988) 4, 26

Mathews v. Eldridge,
424 U.S. 319 (1976) 22

May v. Anderson,
346 U.S. 528, 533 (1953) 24

In the Matter of Mohammed Ali Amer (Appendix H)
Michigan Court of Appeals (June 12, 1990) 23

Moore v. Sims,
442 U.S. 415 (1979) 11 3

Morton v. Moncari,
417 U.S. 535 (1974) 24

Palmore v. Sidoti,
466 U.S. 429 (1984) 24

Riviera v. Minnich,
483 U.S. 745 (1987) 24

Santosky v. Kramer,
455 U.S. 745 (1982) 3, 4, 22, 24, 28

Stanley v. Illinois,
405 U.S. 645 (1973) 24

State v. Denney,
130 N.H.217, 536 A.2d 1242 (1987) 4

Page

Matter of Sylvester,
Pa.300, 304, 555 A.2d 1202, 1203-04 (1989) 25

Washington v. Yakima,
439 U.S. 463 (1978) 24

Washington County Department of Social Services
v. Mary Alice Clark,
296 Md.190, 461 A.2d 1077 (1983) 25

Younger v. Harris,
401 U.S. 37 (1971) 3

Statutes:

25 U.S.C. 24

28 U.S.C. § 1257 2

United States Constitution

Amendment VIX 28

Amendment V 25, 26

42 U.S.C. § 671(a)(15)(16) 29

42 U.S.C. § 672(a)(1); 42 U.S.C. § 675(1) 29

MCR 5.974(E)(3) 5

MCL § 712A.19a(e) and (f) 14

MCR 5.972 5

MCR 5.980(D) 24

MCL § 712 A.2 ..... 7, 26

MCL § 712A.20(d) 7

MCR 5.972(A) 13

Page

MCL § 712A.2(b)(1)(2) 22

MCL § 712A.18 22

MCL § 712A.19(3) 22

MCL § 712A.19(2) 22

MCL § 712A.19(b)(c)(i) 22

MCL § 712A.19b(3)(b)(i) 23

Ohio Revised Code 2151.35 23

Ohio Revised Code 2151.35.3 23

Ohio Revised Code 2151.41.4(E)(1) 23

Tenn. Code Ann. 37-1-29 23

Tenn. Code Ann. 37-1-147 23

Ken. Rev. Stat.620.090(5); 620.080 23

New York Family Court Act § 1055 27

New York Family Court Act § 1046(b) 27

New York Social Services Law § 384(b) 28

MCL § 712.19a 28

MCR 5.965 28

MCR 5.974(D) 22, 28

MCL § 712A.19a(e) 28

MCL § 712A.19a(f) 28

MCL § 750.135 26

Page

MCL § 750.136 26

SECONDARY SOURCE

Patton, *Privilege Against Self Incrimination*,
24 Georgia L. Rev. 473 (1990) 26

IN THE

Supreme Court of the United States

October 1990 Term

No.

In the Matter of MOHAMMED ALI AMER, SUEHIER AHMED AMER and ZINABE AHMED AMER, Minors

REHAB AMER and AHMED AMER,

Petitioners,

v.

DEPARTMENT OF SOCIAL SERVICES,

Respondent.

On Writ of Certiorari To the Michigan Court of Appeals

PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The following opinions are contained in the Appendix as indicated.

A. Opinion of Court of Appeals, June 12, 1990; B. Opinion of Judge Barsamian, January 9, 1989; C. Order of Termination, January 9, 1989; D. Disposition of Judge Barsamian, February 6, 1989; E. Opinion of Judge Maher, December 15, 1986; F. Order of Judge Maher, March 5, 1987; G. Opinion of Judge Maher, October 28, 1986; H. Opinion of Referee McKnight, September 4, 1984; I. Order of Michigan Supreme Court, July 31, 1990; J. Order of Michigan Supreme Court, September 28, 1990.

JURISDICTION OF THE UNITED STATES SUPREME COURT

The jurisdiction of this Court rests upon 28 U.S.C. § 1257 on the ground that the statutes and procedures of the State of Michigan on their face and as applied for permanently terminating parental rights violates the Fourteenth Amendment to the Constitution of the United States and federal statutes relating to parental termination.

DATES OF LAST OPINIONS OF THE COURTS BELOW

The Michigan Court of Appeals issued its opinion on June 12, 1990 (Appendix A) affirming the Probate Court's permanent termination of parental rights. The Michigan Supreme Court denied Appellants' application for leave to appeal on July 31, 1990. A timely motion for reconsideration was denied on September 28, 1990.

FEDERAL LAW INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal law prescribes standards for foster care applicable to the state of Michigan including: 42 U.S.C. § 671(a)(15)(16); 42 U.S.C. § 672 (a)(1); 42 U.S.C. § 6765(1);. See Lodging I

RAISING THE FEDERAL QUESTIONS BEFORE THE MICHIGAN COURTS

All the federal questions raised herein were raised before the Michigan Court of Appeals and the Michigan Supreme Court. The Michigan Court of Appeals addressed and rejected the Petitioners' federal equal protection and due process arguments in its opinion of June 12, 1990. Although the Court of Appeals alluded to the fact that Petitioners had not raised a self incrimination argument below[2] the Court of Appeals addressed and rejected

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[2]The Court of Appeals at page 6 states: "it declines to address the respondents' Fifth Amendment argument in depth". Actually strenuous arguments were made by the Petitioners' trial attorneys, Mr. Strauss at a review hearing and by Mr. Baum at the termination hearing. Furthermore, a Michigan court on appeal can consider matters not raised at the trial level ". . . to prevent a miscarrige of justice." If the Amers would lose their children because an attorney was not as artful as he might have been at the trial, that would be a miscarriage of justice.

the self incrimination argument as well as Petitioners' argument that the Respondent violated federal statutes and that the Michigan Probate Code violated due process of law. (See Appendix H)

REASONS FOR GRANTING THE CERTIORARI

1. Child abuse and false allegations of child abuse are a pervasive social problem confronting state judiciaries. See Patton, *Privilege Against Self Incrimination*, 24 Georiga L. Rev.473 (1990). The Petitioners were deprived of their children, the deprivation of a fundamental right. 2. In permanent termination proceedings there is slight or no opportunity to raise federal issues in lower federal courts. See *Younger v. Harris*, 401 U.s. 37 (1971); *Moore v. Sims*, 442 U.S. 415 (1979); *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502 (1982). Either a state case is pending or the state case is finished and moot or subject to res judicata. 3. The potential for erroneous decisions and unfair procedures is very great considering the state resources arrayed against generally unsophisticated parents. Psychological evidence is unreliable and subjective. The state standards for termination are vague and subjective. The due process standard of clear and convincing is difficult to comprehend and apply. There is a high probability that State officials involved in the process of dealing with allegations of child abuse will overreact to ambiguous but emotionally charged circumstantial evidence. Often, all of those involved in the termination process are inexperienced, unskilled, undersupervised, underpaid, and ill-equipped to make the life and death decision implicit in a decision to permanently terminate parental rights. Personal biases have an open season. In general State officials face self interest risks in never erring on the side of returning children, which they do not face if they err in removing children. 4. Neither state or federal courts have elaborated on the due process standard for permanent deprivation of parental rights since *Santosky v. Kramer*, 455 U.S. 745 (1982) was decided in 1982 despite hundreds of thousands of parental termination cases since that time. 5. A growing practice is the termination of parental rights because parents refuse to confess guilt to the satisfaction of state social workers and the courts, even as in the case at bar, *prior* to a clear and convincing hearing. 6. While many states require clear and convincing proof before children are deemed wards of the court and placed in temporary foster care, other states, like Michigan require only a preponderance of the evidence standard for placing children in foster care of unlimited duration. In Michigan, the findings at such a hearing are conclusive at a subsequent permanent parental termination hearing as in this case; the length of time in foster care is a presumptive factor in the termination decision as in the case at bar.

INTRODUCTION

Writing for the New Hampshire Supreme Court, Judge (now Justice) David Souter wrote: (See Appendix O-1)

This Petition gives this Court an opportunity to elaborate on the due process standard for terminating parental rights permanently,[3] providing a degree of national uniformity to the type of hearing due process requires. As currently defined, the clear and convincing burden of proof requirement has become a talisman sanctifying idiosyncratic views of what state officials feel is best for children. Courts have not succeeded in usefully defining the standard. The very factors cited in *Santosky v. Kramer*, 4355 U.S. 745 (1982) and in *Riviera v. Minnich*, 483 U.S. 745 (1987) which warranted a special concern for the fairness of parental termination procedures militate in favor of granting this petition. Those who become enmeshed in a termination proceeding are invariably families with health, financial, personal difficulties; they are the poorer, less educated members of society; they are the foreign born. They are multitudes whose stifled voices unwittingly invite bureaucratic manipulation, well meaning or not. They call upon this Court to grant this petition. Today, perhaps more so than at the time *Santosky* was decided, allegations of child abuse are rife. Many are well founded, and many not. *In re Martin*, 167 Mich App 715; 423 NW2d 327 (1988) which came (1988) within a whisker of perpetrating a tragic, judicial error is but one example where the allegations were not well founded. Nevertheless, in *Martin* as in this case, with an unfortunate physical illness, multiple fractures, enough to tax any parent's heart, the Martins were subjected to a painful, humiliating and protracted temporary foster care placement. They were required by state officials to falsely confess to having harmed their daughter under the threat of permanent termination. They refused. The Department of Social Services threatened. The Court of Appeals criticized the Department policy and ordered return of the child. But the practice continues.

Michigan's parental termination practice permitted findings made at a stage in the proceedings when a mere preponderance of the evidence was sufficient to be conclusive at a later permanent termination phase of the proceeding. It permitted temporary removal of children for unlimited duration without a clear and convincing standard. In allowing unlimited duration removal, Michigan law permitted a shift in the burden of proof because the *State* prolonged temporary foster care. It permitted the State to require parents to confess to having harmed their child, presuming that their refusal, together with the inexplicable calamity which befell a child, constituted clear and

[3]See Appendix J for litigation chronology.

convincing support for parental termination of rights to other healthy children. The Petition of Mr. and Mrs. Amer, parents of Mohammed Ali, born December 11, 1982, Suehier, born November 18, 1983, and Zinabe, born December 9, 1986, will allow this Court to hold that such procedures are not the process which is due when the state would sever the tie of parents to their children forever.

STATEMENT OF THE CASE

The petitioners emigrated to this country from Lebanon and are the parents of three children. A fourth child, Samier, a twin of Suehier, died November 22, 1985, just after his second birthday. As a result of his death, Suehier and Mohammed Ali, both in good health were immediately removed from the home of the Petitioners and placed in temporary foster care with Donna Moore. One year later, Zinabe was also removed from her mother at the hospital when she was 1 day old and placed in temporary foster care with Bernice Canup.

Permanent Termination Hearing (1988-1989)

All of the children remained in their respective foster homes until the decision of Probate Judge Y. Gladys Barsamian on January 9, 1989 terminating permanently the parental rights of the Petitioners to the three living children. Permanent termination was based upon a finding by clear and convincing evidence, MCR 5.974(E)(3), that the criteria of MCL § 712A.19a(e) and (f) were met. The statute on which Judge Barsamian relied provided in pertinent part: (See Appendix O-2) The termination decision of Probate Judge Barsamian was purported to be based on the "testimony and written documents produced as evidence" before her; and the "legal file and the social file in this matter, which are considered to be reflective of this case". (T 1/9/89 p1714) As a result of this reliance, the court below concluded: (See Appendix O-3)

The termination opinion of the trial court below was based not on evidence before it at the termination hearing, or even evidence adduced at the prior hearings, but on the *findings* of two different judges at prior adjudications where the standard of proof under Michigan law was merely a preponderance of the evidence, MCR 5.972, rather than the clear and convincing standard required in termination procedures by the Fourteenth Amendment. More specificlaly, the Court below did not rely on medical or contextual evidence as to the cause of Samier's fractures in 1984 nor on medical or contextual testimony as to the cause of Samier's death in 1985. In addition, the Court below predicated a finding that the Petitioners were irredeemable as proper parents because of their persistent protestation that they did not "kill" their

son Samier. The testimony of the experts, including those selected by the court or the State were overwhelmingly not in favor of termination, but in favor of reunification. See page 30 *supra*. There were essentially four types of hearings with respect to child protection: adjudication— to determine if the court should take jurisdiction over the children; disposition— to determine the appropriate remedy if the court had jurisdiction; review hearings; and termination hearings. Only the termination proceeding required proof by clear and convincing evidence. At the time the Court below required a confession, the clear and convincing hearing had not yet taken place.

Brief Summary of Two Hearings Prior to Termination

The first adjudication relied on by the Court below resulted from a petition from the Probate Court to take jurisdiction over Samier dated April 2, 1984 which alleged that Samier had 5 fractures. The petition alleged that the parents were unable to explain the fractures. The child also evidenced "bite" marks of a 16-year-old baby sitter. (Oakwood Hospital Medical Records 3/12/84) On September 4, 1984 Referee Gail McKnight found by a preponderance of the evidence that the Petitioners had abused Samier because they could not explain how four month old Samier had incurred 5 bone fractures, in varying stages of healing. Consequently the court had jurisdiction over the child. Samier was first placed with his aunt and then on October 20, 1984 with his maternal grandmother who spoke only Arabic and who lived next door to the parents. From 2/22/85 Samier was with the Petitioners from Friday through Monday. From 5/16/85 until his deathon November 22, 1985, Samier lived with his parents from Thursday through Monday. (Wayne County Case History 1/13/86 p 5) (hereinafter Case History). They successfully participated in parenting class required by the Department of Social Services. Nothing untoward occurred with respect to any of the children during this time.

Although pressure was brought to bear on the Petitioners by the Department of Social Services and the Wayne County Clinic for Child Study to confess to having intentionally inflicted Samier's fractures, they refused, steadfastly denying that they had harmed him. The Wayne County Clinic for Child Study psychiatrist, a Dr. Schornstein characterized the petitioners' protestations of innocence as a "denial phase". (Case History, p 6)

At a hearing on October 10, 1985, Tuesday and Wednesday were added so that Samier was then with his parents for the full week instead of Thursday through Monday. The Probate Court retained jurisdiction and imposed certain restraints on the Petitioners. (Case History p 10). The Probation Officer noted: (See Appendix O-4)

On August 13, 1986, the Circuit Court of Wayne County in a criminal proceeding acquitted the Petitioner, Rehab Amer of second degree murder of her son Samier. Six months later, the Department began conditioning return of the children on their confession of guilt in the death of Samier.

The second adjudication which the trial court relied on was at the adjudicative, pre-termination phase. Judge Maher issued an opinion dated October 28, 1986 resulting in a finding of December 15, 1986 that Mohammed Ali, Suehier, and Zinabe were within the jurisdiction of the Court pursuant to MCL § 712A.2 which provided: (See Appendix O-5)

Under the Michigan Court Rules 5.972 the standard of proof was by a preponderance of the evidence. The October 28, 1986 opinion of Judge Maher found that the Petitioners had "killed" Samier on November 22, 1985. The Court accepted the hypothesis that the injury could only be caused by a "high velocity" impact "to the back of the head", "one impact caused on a flat surface". (See Appendix G, pp 5-7). The court noted testimony that the type of injury would result from a force equivalent to a fall from two or three stories. (Exhibit p 7). A more detailed account of the medical testimony follows at pages 10-12. The Court's opinion alluded to the importance of the Koran to the Petitioners; noted that it took Emergency Medical Service 20 minutes between the injury and arrival; that Samier's hair was dry; that it was odd the Petitioners put a diaper on the baby; noted apparently confusing and conflicting reports about what Mrs. Amer said on November 22, 1985 as to how many children were in the bath tub and what Mrs. Amer said to the nurse at Oakwood Hospital; and what she said to the driver of the Emnergency unit, and what was said to Officer Bunce.

As for Mrs. Amer, the court "did not think her emotional reaction was "appropriate"." Later on when she testified as to when Samier died her emotions — again, I'm talking about basically her tears were appropriate and her demeanor also changed." (Exhibit p 10) But Judge Maher said he ". . . heard her orchestrate what would sound be t to the Court. . ." He concluded: "So, if you take all of the testimony put together and you just use common sense this is a situation where one of these two people is responsible for the death of that child and the other person is responsible for not protecting that child." Mohammed Ali and Suehier were made wards of the court. (See Appendix B, pp 3, 5-8, 10-11). Pursuant to MCL § 712A.20, Judge Maher could have permanently terminated the parental rights of the Petitioners. (See Appendix O-6)

But he did not. Nor did Judge Barsamian at several subsequent review hearings. Throughout these proceedings the Petitioners denied having harmed Samier but the petition for termination and the termination of the court below

was triggered by the refusal of the Petitioners to confess that they had intentionally caused the death of their son.

The report of John Derr, a psychologist affiliated with the Probate Court reported that a Dr. Day noted that Mrs. Amer had a Lebanese background and Mr. Amer Egyptian and "it might be of some value to find someone who speaks Lebanese or Egyptian so that a better understanding of the nuances of this family could be obtained." (Report August 31, 1984). This was not done, to the contrary, those independent social workers involved in the case having an ethnic affinity to the Petitioners, most particularly Nancy Adadow Gray, were barred by the court below from providing services to the Petitioners because of their belief that the Petitioners had not abused Samier.

First Adjudication — More Detailed

The Amers first came to the attention of the Department of Social Services after they took Samier to the Oakwood Hospital on March 12, 1984 complaining that Samier was eating poorly. Samier Amer had inexplicable medical difficulties from the day he was born. The Oakland Hospital medical records reported: "The parents complained chronically that the child does not eat well."

At 3 months of age both Samier and his twin Suehier were treated at Botsford Hospital for a blood infection. The Oakland Hospital report of a Dr. Johnson notes: "He was seen in my office for the first time following his hospitalization at Botsford on 2/27/84." The chief complaint was that Samier cried a lot. He was again seen by Dr. Johnson on 3/6/84. "At this time we decided to change the patient to Nutrigen formula which his mother was unable to obtain. Since 3/6/84 he has had continued weight loss and has refused to take more than 6 ounces per day of formula resulting the present admission." The Oakland Hospital Report of 3/12/84 indicated that the Petitioners tried a variety of techniques in an attempt to resolve the feeding problem including assistance by a visiting nurse. The Report observed: "The patient is comfortable lying in his mother's arms or on the table but holds its arms rigidly flexed and its legs rigidly flexed." (Oakwood Hospital records 3/13/84) Samier had been taken to a pediatrician for tonsillitis and teething problems. (Wayne County Juvenile Court Case History 1/13/86 p 10)

A review of the *findings* of Referee Gail McKnight dated September 4, 1984 (Appendix A) reveals the following: The Department of Social Services report ". . . shows the family to be residing in a fine, clean, suitable home and shows the family to be close knit, with bonding and no evidence of marital discord" (paragraph 5); the Referee reported the testimony of Rehab Amer and the efforts she had made with respect to Samier's difficulties

and health (paragraph 11); she reported in paragraph (12) the testimony of Ellen Rumman, a licensed MSW who reported on a warm and loving family relationship amongst the Amers with a good family background. In paragraph (13) Referee McKnight reported that Dr. Ruth Day, "an expert in psychiatry . . . acknowledged that there was something wrong with the child, Samier, which would have caught by the various doctors who viewed the child. . . ." Dr. Day believes it is necessary to have an interpreter to assist the family in preparing a final treatment plan." Dr. Day recommended against return of the child at that time, however.

In paragraph (10) the Referee reported on the testimony of a medical social worker, a Ms. Sabo: (See Appendix O-30)

Paragraph (6) refers to testimony of Dr. Carolyn Johnson, an "expert in pediatrics", hired by the Amers to care for their children, and refers to the interaction between doctor and child. Referee McKnight stated: ". . . the Court finds that Samier is a much different child than his siblings." "The doctor did arrange for the child to be admitted to Oakwood (Hospital) as a result of the mother's continued complaints regarding the child's feeding problems." In other words, the mother was seeking medical help for Samier all along. The Referee's report continued: "The doctor found the child to be a very stiff baby who is hard to manipulate. This trait is called being hypotonic.[4] A normal baby is more floppy, like jello." Reporting the Doctor's testimony, Referee McKnight said: "The doctor found the child to be very attentive to his mother and the child definitely preferred his mother to any other person." In paragraph (7) of Referee McKnight's findings, she reported regular contact between Dr. Sheldon Schore and the Amer family from December 5, 1983. Samier was born on November 18, 1983. In fact: "The family did bring the child to his attention January 20, 1984 when the child's right arm was limp. Dr.Schore referred the child to an orthopedic specialist, Dr. Mandell. The doctor did not file a 3200." (suspected child abuse report) At none of these many visits to physicians offices was evidence of child abuse noted.

The Referee found that Samier exhibited some human bite marks but does not state they were "unexplained" as the Michigan Court of Appeals stated. The report of Oakwood Hospital of 4/12/84 stated: "None of the areas were erythematous, . . ." (superficial scraping of the skin." (See Oakland Hospital

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[4]Hypotonic means a diminished tone or tension in muscle or muscular tissue in consequence of ". . . which the muscles may be stretched beyond their normal limits." Stedman's Medical Dictonary). Thus the Referee reported that Samier was *not* a normal baby.

Report) The Referee referred to a number of unspecified tests conducted by some doctor "to rule out bone disease." The Referee's report stated: "There is no medical reason for the child to have a large number of fractures." In paragraph (9) the Referee noted the testimony of Dr. Osher, that the fractures were of different ages. In paragraphb (8), Referee McKnight reported on the testimony of a Dr. Suarez. Noting the several fractures, the Referee said: "The doctor based on his experience, concluded it to be likely child abuse." But Ellen Rumman, MSW, who had worked with the Petitioners thought that no abuse had occurred regarding Samier. (Wayne County Juvenile Court Case History, p 5-6). Further, the Oakwood Hospital medical report of Dr. Johnson has typewritten: "1. superficial human bites", "2. possible feeding problems', "3. possible muscle disorder." In someone's handwriting is a separate impression "4.____ child abuse." As a result of these findings, Referee McKnight found the allegations under MCL § 712A substantiated, and she made Samier a temporary Court ward. (A-2) The child was placed on or about Sepember 4, 1984 with the maternal grandmother, Fekenh Hamka (a-3) located next door to the parents. For all practical purposes the Amers took care of Samier for more than a year after this before he died on November 22, 1985. (Case History p 6)

There was no evidence or finding that the other children, Suehier or Mohammed Ali were abused. Although seen by medical personnel on many occasions there was no evidence that anyone had seen anything wrong with Samier until a fortuitous x-ray was taken at Oakwood Hospital on March 12, 1984. There was no evidence of such signs of child abuse as burn marks, bruises, lacerations, drugs, feces, sexual abuse, filth, starvation etc. There was evidence of a loving and caring family, not a dysfunctional one. There was no history of child abuse. In other words, all the circumstances were indicative of a non-abusive family except for inexplicable fractures and minor scraping of the skin, called bite marks.

On November 15, 1985, the Probation Officer "observed that the father was experiencing 'extreme difficulty' in settling Samier down, i.e. the child would ask for his bottle in Arabic and when given the bottle, would refuse it on several occasions, and/or would request to lie down, and when placed on the sofa would complain and request to be moved." (Case History p 11)

On November 22, 1985, Samier was dead.

Second Adjudication — More Detailed

The second adjudication relied on by the Court below in reaching its conclusion that the parental rights of the Petitioners with respect to Mohammed Ali, Suehier, and Zinabe should be permanently terminated was contain-

ed in the opinion of Probate Judge Martin Maher dated October 28, 1986, the consequence of the death of Samier. On October 28, 1986 and in his finding of December 15, 1986 Judge Maher decided that the three Amer children should remain in temporary foster care, finding that one of the Petitioners had "killed" Samier, that "one of the respondents was responsible for the nonaccidental death of Samier while the other parent failed to protect the child." This finding, based upon a preponderance of the evidence as required by Michigan Law was for the purpose of continuing jurisdiction of the Probate Court over the three Amer children, giving the Probate Court a variety of options, including a return home, or temporary foster care.

The testimony of the Petitioners indicated that on November 22, 1985, Samier was in the bathtub; the phone rang and Mrs. Amer went to the phone as was her practice when her husband was asleep, heard a thump, ran to the bathroom and found *Samier* unconscious. Her husband heard her scream and he called Emergency Medical Service. Nearby family members came to the house. There are no circumstances or evidence to contradict this account of Samier's death. No blood was found; no external bruises on Samier's body, not even on the exterior of Samier's skull. (a-a5) (T 12/15/88 at 1199-1211). The ex-ray of Samier's skull has thus far been lost. No diagnosis of Samier for osteogenesis imperfecta, copper deficiency, or other bone disease was made before or immediatley upon his death. The report of Dr. Sarniak, the Wayne County Medical Examiner, dated November 22, 1985 states: "SKULL: two views. large diastatic skull fracture seen extending from the lambdoid suture down towards the foramen magnum. A second transverse fracture is seen passing transversely across the occipital bone. These fracture fragments are separated by 3-4 mm. *No depression is seen.* The sutures are separated fairly markedly. No other fracture is seen." (emphasis added). Without explanation for its conclusion the autopsy states: (See Appendix O-7)

Additional versions of the testimony of Dr. Kanluen and Dr. Sarniak, Wayne County Medical Examiner, are contained in Appendix M.

On December 15, 1986 negotiations between Mr. Strauss, the attorney for the Petitioners and Judge Maher produced an agreement that Zinabe would become a "temporary court ward" based upon an understanding, not fully expressed in the transcript that the family would be soon reunited. (T 12/15/86 p 1-2). Judge Maher accelerated the next hearing date from July to March, 1987 for this purpose. (T 12/15/87 p 3). He stated: "I'm also going to be looking at what the workers have done to try and reunite the family." (T 12/15/87 p 3). Judge Maher continued: (See Appendix O-8)

In order to alleviate the problem of the temporary foster mother. Mrs.

Moore, undermining the ethnic background of Mohammed Ali and Suehier, and undermining the goal of reuniting the family, Judge Maher ordered the ". . . Department of Social Services to investigate possible Lebanese and Arabic homes; to look at the relatives of the parents. Hopefully, that will alleviate the problem. I don't think it's proper for Mrs. Moore to take the children to church other than a mosque." (T 12/15/86). Not only did Judge Maher not order confession as a condition of returning the children, but the tenor of his findings was that the childeren should be returned quickly. (T 12/15/86 at 4). Judge Maher was then transferred from the juvenile branch of the Probate Court to the estate branch and did not actually issue his order until after a motion by counsel for the Petitioners to compel Judge Maher to issue his order. When it was issued, the intention of promptly returning the children to the Petitioners was not expressed therein. On March 5, 1987 Probate Judge Maher issued an order that the Court had jurisdiction over Mohammed Ali, Suehier, and Zinabe finding that the three children were within the Juvenile Code, that the allegations of neglect and abuse of Mohammed and Suehier, and neglect of Zinabe were sustained, and temporary foster care continued: (See Appendix O-9)

The parents did attend counselling and parenting classes assidously. They gave a list which the Department of Social Services ignored. No family therapy was permitted by the lower court. On or about January 5, 1987, the Petitioners were asked by social workers assigned to the case to confess to having killed their son Samier as a precondition for the return of their living children. Up to that point this had not been a requirement. Judge Maher did not and never did approve or order it. The parent/agency agreement signed by the Petitioners and social worker dated 6/24/86 contained no such requirement. After Judge Maher's decision a new parent/agency agreement was presented to the Amers. The newly proposed agreement, never signed by the Petitioners would have obligated the Petitioners: "To attend counseling and also to acknowledge and accept responsibility for the severe abuse inflicted on Samier Amer, now deceased."

Judge Barsamian Enters the Case

The trial judge, Judge Y. Gladys Barsamian, entered this case replacing Judge Martin Maher on March 10, 1987. Judge Barsamian's ultimate decision to terminate the parental rights of the Amers was forecast in her opinion on May 29, 1987 at the conclusion of a statutory review hearing during temporary foster care: (See Appendix O-10) In the Court's order of June 1, 1987, following the statutory hearing, Judge Barsamian required the Amers to "accept responsibility for the non-accidental death of Samier"; and she said that "The children are not to be placed with relatives. The mother's

visits with Mohammed are terminated until further order of the court."

The Decision of Permanent Termination

On December 16, 1987 the petition for permanent termination was filed. It was filed because the Amers would not confess to killing Samier. (T 1/9/89 at 1688) and (T 10/18/88 at 940-942) Thereafter, for over a year from the filing of the petition, evidentiary hearings were held. The hearing to be held within 42 days pursuant to MCR 5.972(A) began January 12, 1998, was actually truncated in bits and pieces and did not end until January 9, 1989 with the termination decision referred to above.

Before any testimony was taken, a renewal of a motion was made for a conjoint evaluation of the Petitioners and their children. The Court denied the motion and responded, inter alia: (See Appendix O-11) As to the ultimate question of whether the parental rights of the Petitioners should be permanently terminated the overwhelming evidence of several experts including those selected by the Court and including the foster mother Mrs. Canup, was opposed to termination. Even the Wayne County Clinic for Child Study Director recommended against termination. The trial was limited by the Court to a single factual issue. That issue was whether or not the Petitioners had confessed to having killed Samier. Proof as to the *cause of death* of Samier was not an issue permitted to be explored by the trial court. No law enforcement, medical, or other expert testimony was offered as to that. As Mr. Ladd, the Court appointed and State paid attorney for the children stated in his Brief before the Michigan Supreme Court at page 19: (See Appendix O-12) The compliance by the Petitioners with various directions of the Court and the Department of Social Services to participate in psychotherapy, attend parenting class were apparently ignored by the court below. That the petitioners visited their children at every possible permitted moment was not considered; evidence of love and affection between the Petitioners and the children, such as a video and aural tapes, and photographs was not considered; requests for conjoint psychological examinations were denied by the Court below. No conjoint evaluation was done in this case despite several motions by counsel for the Petitioner to bring this about, despite Judge Maher's order alluded to above, despite the recommendation of the Wayne County Clinic for Child Study in its report of 2/19/88 that "the family begin work with an experienced therapist to do neutral family observations and interventions." (T 8/12/88) Petitioner's Exhibit B at 3). Indeed, visitation was made more difficult and demeaning by the workers assigned to the Amers. (a-34) (a-35).

After referring to the first placement of Samier in foster care in 1984 (T 1/19/89 at 12-13), Judge Barsamian alluded to the preliminary hearing con-

ducted by Probate Judge Martin Maher which had concluded in 1986, almost a year after Samier's death. She stated that Judge Maher had determined "that Samier Amer was killed." (T 1/9/89 at 14). Although Judge Barsamian referred to Judge Maher's finding during the adjudicatory phase, she did not rely on specific evidentiary support for her conclusion that the Amers "killed" Samier. (T 1/9/89 p 14). Judge Barsamian's opinion stated her basis for termination: (See Appendix B 24-28)

On the basis of the foregoing, the Court found that "there is clear and convincing evidence that paragraph (e) and (f) of MCLA 712.19A have been established." (T 1/9/89 at 1733-34).

The Court then addressed the "best interest of the children" (T 1/9/89 at 1734) and concluded that their best interest would be served by permanent termination. There are no findings in this regard. (T 1/9/89 at 1734)

In summary, Judge Barsamian's decision relied upon Referee McKnight's findings, and most importantly upon Judge Maher's findings made at the adjudiction preliminary phase of this proceeding. She did not articulate or recognize a distinction between the jurisdictional hearing (also known as a preliminary or adjudicative hearing), the statutory review hearing, or the termination hearing with respect to statutory criteria or burdens of proof. She merely assumed that refusal to confess was clear and convincing evidence supporting termination. She apparently assumed that proper efforts were made to reunite this family. A review of the transcripts reveals no evidence of any good faith attempt to reunite this fmaily. None.

During the termination hearing, Judge Barsamian would allow no testimony about discrimination against the Amers because of their ethnic background (a-38); would not listen to or admit into evidence tapes of the interaction between the Amers and their children; she would not talk to the children (T 12/15/88 1443-1445) would not allow questions about purposeful alienation of the children from their parents (T 12/16/88 at 1519-1523); refused to order neutral conjoint evaluation as requested by motion; would not allow any testimony about the competency of the Clinic for Child Study report of 1988 (T 12/16/88 at 1540-1542); and would not let the Amers' expert Dr. Gordon Blush, a psychologist with extensive experience (T 6/6/88 Exhibit Two) testify about the psychological effect of permanent parental termination upon the emotional well being of the children. (T 12/16/88 at 1533-1534) Most importantly, when counsel for the Amers attempted to question Ahmed Amer about the death of Samier, the Court said: "I agree with Mr. Ladd on the whole in terms of the matter has been adjudicated, findings of fact have been made." (T 12/15/88 at 1376).

Expert Testimony Opposed to Termination

The testimony of Dr. Ralph Epstein, selected by the DSS as the therapist for the Amers, Dr. Joseph Fischoff, a Court expert witness, and Mr. Derr of the Center for Child Study do not support termination. Quite to the contrary. The Children's Hospital Report of December 6, 1988, prepared at the direction of the Court below did not recommend termination. Dr. Gordon Blush did not recommend termination. Bernice Canup, foster parent of Zinabe recommnded reunification of the family. Dr. Ralph Epstein testified on May 13, 1988. His curriculum, vitae is impressive. (T 5/13/88 at Exhibit 1) He saw the Amers more than 50 therapy sessions. He testified that State social workers were only interested in whether theAmers had confessed. They pressured him to obtain a confession of guilt from his patients, the Petitioners, (T 5/13/88 at 69-70). However, he refused on the ground of inconsistency with his professional function. (T 5/13/88 at 70). (T 5/13/88 at 71) (T 5/13/88 at 71). (T 5/13/88 at 87); (T 5/13/88 at 87). However, Dr. Epstein testified that the Petitioners felt they bore some responsibility for what happened, (T 5/13/88 at 78) and accepted their responsibility from a psychological point of view. Without equivocation Dr. Epstein testified that the Amers were able to safely care for their children. (T 5/13/88 at 110-11); (T 6/6/88 at 167-168).

On October 17, 1988 Mr. Derr of the Wayne County Center for Child Study, who had evaluated the Amers based on five visits, testified on behalf of the State. (T 10/18/88 at 734-788). On re-cross-examination, Mr. Derr testified that: (1) the Amers accepted responsibility for Samier's death (T 10/18/88 at 855, 869, 880-81). Mr. Derr testified that the question of whether Mr. and Mrs. Amer were accepting responsibility for what had happened was one for their therapist, selected by the DSS (Dr. Epstein) to determine. (T. 880-881); (2) he was unable to say that psychological intervention could not be expected to prevent future harm to the children (T 10/18/88 at 854); (3) he does not know of what Mohammed-Ali is fearful (T 10/18/88 at 856); (4) Mohammed-Ali's fear is a diffused, general reaction which is not necessarily attached to his mother (T 10/18/88 at 870); (5) Dr. Al-Omari, Director of the Center for Child Study, believes that permanent custody should not be taken; instead, efforts should be made to reunite the family (T 10/18/88 at 870-73); (6) he saw no risk to brief, monitored visits between parents and children at the Amer home (T 10/18/88 at 877-78); (7) he was in favor of a neutral psycho-dynamic observation of Amers and the children (T 10/18/88 at 745); (8) if the goal was to reunite the family, brief visits at the Amer home were necessary (T 10/18/88 at 878). Counsel for the Petitioners questioned Mr. Derr further: (See Appendix 0-13)

Dr. Fischoff, the Court's witness, testified that the Amers have had no opportunity to show what kind of parents they would be since the children weren't allowed go go home. (T 12/16/88 at 1617-1618). No home visitation was ever suggested or permitted. The questioning of Dr. Fischoff continued: (See Appendix 0-14).

He testified that the impact of termination of parental rights on the children and their adoption "presents a problem" for the children. (T 12/16/88 at 1611). He found no evidence of mental illness on the part of the Amers. (T 12/16/88 at 1614-1615) As to how Samier died, from his reading of the report he said: "The second question about how Samier died. And that's very questionable and hazy to me." (T 12/16/88 at 1617) Nor did the Children's Hospital Report recommend termination: (See Appendix O-15)

Dr. Gordon Blush, a psychologist familiar with the case, after reviewing the entire record testified that there was no evidence to cause a significant doubt of the Amers' abililty to care for their children. (T 12/16/88 at 1505-1511)

The foster parent Bernice Camp, who had custody of Zinabe testified in favor of returning the children to the Amers. She also testified that in April 1987 she was threatened by DSS workers that in the event she testified in favor of the Amers, Zinabe would be removed from her as fast as she had been removed from the Amers. (T 12/12/88 at 1089-1090). (Zinabe *was* removed from Mrs. Canup immediately after her testimony). (T 12/12/86 at 1058) (T 12/12/88 at 1058). There is no evidence in the record that members of the Amer family, such as the grandmother, or other person with Arabic or Islamic traditions were not qualified to be involved with the Amer children as temporary foster parents and there is no evidence that any good faith effort was made to maintain the children in a traditional environment. Such persons were and are deliberately barred on the basis of ethnicity. (T 12/12/88 at 1036). (a-10) (a-43) (a-14).

No Efforts To Reunite the Family

The Department refused to make any effort to reunite the family unless and until the Petitioners confessed. In fact, the history of the Department of Social Services and the Judson Center (a private foster care agency under contract to the State), involvement with the Amers reveals no effort to reunite the Amer family. A parent-agency agreement was proffered to the Amers by the Judson Center in June of 1986. (T 10/18/86 at 923-924). The Amers signed it on June 24, 1986 and so did the foster care worker. (Appendix K) (T 10/18/88 Exhibit 1) (a-11). The Amers complied with it in all respects. A State social worker Sanford explained that the Amers were not required

to "accept responsibility" for abuse at that time "Because the court had not ruled on what happened in the parents' home at that point." (T 10/18/88 at 926). In fact the Judson Center and the DSS specified that the return of the children hinged oin the outcome of the criminal trial involving Mrs. Amer: (See Appendix O-16) As of January 7, 1987, the goal of the Department of Social Services and the Judson Center and the Probate Court was to reunite the family within nine months. (T 10/18/88 at 954). Thereafter, sometime in January 1987 a second and different parent agency agreement was proffered to the Amers which the Amers refused to sign. This agreement contained paragraph 5 which provided inter alia: (See Apppendix O-17)

Sanford testified: (See Appendix O-18) And she testified that "no effort will be made to this family" until the Amers accept responsibility for the death of their child. (T. 957) On May 8, 1987, the second trial day of the statutory review hearing while the children were in temporary foster care, Elyse Fine of the Judson Center assigned to the Amers, testified that no effort could or would be made to reunite the family until the Amers confessed. (T 5/8/87 at 234 and 309) The testimony of the DSS worker Sanford was that no effort was to be made to reunite the family until the Amers confessed. (T 10/18/88 at 957). She could not point to any specific effort made to reunite the family although she testified that everything that could be done to reunite the family was done. (T 12/12/88 at 1016). For example, she never consulted with the Amers' psychotherapist, Dr. Epstein. (T 12/12/88 at 1029). Sanford testified that there was no in house supervision of the Amer children because the children were never permitted to be back in the Amer house. (T 12/12/88 at 1039). Finally she testified that no effort was ever made to work out an acceptable parent agency agreement with the Amers or their therapist. (T. 975-976). She never even called Dr. Epstein, their therapist. (T. 976) There is no testimony concerning the rationale of requiring a confession of guilt in January 1987, when such a condition was not imposed before. Neither in December 1986 or January 1987 had any Court prescribed that the Amers confess guilt as a condition for reunification, or as a condition for the taking of any steps towards reunification. There was only insubstantial evidence to support termination before Judge Barsamian, either at pre termination hearings before her or at the termination hearing itself.

Evidence Favoring Termination: Refusal to Confess as Clear and Convincing Evidence for Termination

Dr. Wayne Simmons, employed by the Judson Center, a contract agency of the State with responsibility for Mohammed Ali (T 6/16/88 p 325), testified at a statutory review hearing in May of 1987, that Mohammed Ali had to

be "traumatized" by experiencing the death of his brother. His chief source of information was Ms. Moore the foster parent found by the trial court to have had a bad relationship with the Amers. Simmons never spoke to the Amers or observed an interaction between the Amers and their children. He saw Mohammed Ali one time. Mohammed Ali did not speak English when taken from his parents. (T May 8, 1987).

Dr. Shornstein, Elyse Fine, Martha Carey, and Julie Ribaudo were all employees of the State. Dr. Shornstein "evaluated" the Amers only prior to the death of their son. (T 6/17/88 418). He testified that he didn't know whether the Amers were fit parents or not. (T 6/17/88 at 435). He was unsure whether termination should ensue or not. He was asked on cross examination whether it made sense to have the family in therapy together. He answered, yes, and that it would help him to make an evaluation. (T 6/17/88 429-431). At this juncture in the testimony, Judge Barsamian interjected, there was no need for such a conjoint evaluation because it was a termination proceeding. (T 6/17/88 431-432). Dr. Schornstein testified that a patient in therapy should not be forced to deal with any particular issue in therapy. (T 6/17/88 447-448).

Elyse Fine was an inexperienced social worker, employed in her first job by the Judson Center, from May 1986 to July 1987, having received her B.A. in 1985 and MSW in 1986. (T 6/16/88 314, 317) This is what she actually testified to about the necessity for the Petitioners to verbalize guilt, i.e. confess. (See Appendix O-19)

Martha Carey succeeded Fine at the Judson Center. She received her MSW in May, 1987 and was another inexperienced social worker. She explained why she wanted a confession: "Because no progress could be made or no — We could not make any other reunification efforts until the parents worked on that issue." While speculating (with great empathy for Mr. and Mrs. Amer) that Mr. Amer lacked empathy for his children because he wanted to take Mohammed Ali's picture, and Mrs. Amer wanted to comb Suehier's hair, (these desperate people at their two hour institutional visit with social workers scrutinizing their every move) (See Ladd Michigan Supreme Court Brief at 15), Martha Carey testified that: "Mohammed had stated that he would like to live with Baba, referring to his father." (T 6/17/88 p 513) and to Dr. Coate, that he would like to visit with his mother. (T 6/17/88 p 532). She wrote that Mohammed Ali feels a conflict between his mother and the foster mother. (T 6/17/88 p 533). Julie Ribaudo had also been an employee of the Judson Center before joining the Wayne County Clinic. She apparently had seen the Amers in April 1988. She noted about Mrs. Amer: "The overriding pattern that I saw as she was born and raised in

Lebanon." This is not all she said of course, but it is the first thing she said.

She was asked by Mr. Ladd: "Q Should a parent be able to verbalize how things would be different in the home if the court returned the children to them? A It would be a good sign. It wouldn't be totally indicative that they would be able to employ it." (T. 612) However, she also testified that *Dr* Al-Omari, the Director of the Center for Child Study differed with her as to the requirement of a confession. (T. 623). She testified about the cooperativeness of the parents, that they were eager to get their children back and did everything asked of them, had been "punctual at appointments, eager and enthusiastic and very desirous of getting their children back", that Mrs. Amer missed her children, was depressed about the possibility of losing them. (T. 1627-628) *She said it was unusual for permanent termination to take place when the parents have been so involved. (T. 628-6792)*

She observed at a visit between the Amers and Mohammed Ali: "Also earlier in the time Ms. Moore (the hostile foster parent of Mohammed Ali and Suehier) had understood that Mohammed couldn't have visitation with Mrs. Amer. So when they walked into the lobby and Mrs. Amer was there, and there were no workers around, Ms. Moore snatched Mohammed back and pulled him out onto the porch until she could get approval that it was okay to bring him in." (T 588) When counsel for Petitioners asked Ribaudo whether Mohammed Ali's confusion was because of hostile communications from Donna Moore, the foster mother to Mohammed, the Court sustained the objection of the Attorney General to the question. (T. 636-637) Finally she was asked: (See Appendix O-20)

Kimberly Gunter Sanford, a protective services worker for the State, had a Bachelor's degree in psychology and sociology from McKendree College. (T. 914). In answer to the question as to why confession was necessary she answered: (See Appendix O-21) Explaining herself, she testified: (See Appendix O-22)

She explained the Department of Social Services rationale for permanent custody: (See Appendix O-23) Karen Noel was a limited licensed psychologist with an MSW which she received the previous year. (T. 243). She had seen Mohammed Ali 4 times, 2 in the presence of the foster mother Moore (T. 278). She never saw or contacted the Amers. (T. 291) She indicated that she was just getting to know Mohammed Ali. (T. 279). She was aware of the hostility between Moore and the Amers. (T. 279). She testified that for a long time, Mohammed Ali thought the firemen had his brother Samier. (T. 288) She didn't know what Mohammed Ali thought about the death of Samier. (T. 290) She testified: (See Appendix O-24) The testimony and

records indicate that the State social workers and Mrs. Moore did what they could to discourage a return of the children to their parents. The foster parent Donna Moore harbored negative feelings towards the Amers, attempting to alienate them from their parents, coaching them what to say to the social workers. (T 12/13/88 1161, 1163). She apparently took the children to a church instead of Mosque, called them Sue and Lee instead of their given name, and denigrated the Amers and their culture. The reports indicate Moore' overt and active hostility to the Amers. This was not in dispute. (T 12/13/88 at 1175) (T 12/16/88 Exhibit 14). Despite the Amers' strong objections to Moore, the State social workers and the Court prepetuated that placement. (T 12/12/88 at 1014-1016). Yet, Sanford testified that the Amers did everything asked of them *and except for the confession requirement would otherwise have recommended the return of the children.* (T 10/18/88 at 931-933). From the time their children were removed, the Amers have attempted to and did have as much contact with their children as the Court, the Department of Social Services, and the Foster Parents would permit. They came to the Judson Center or other facility week in and week out, they brought food and clothiNG and toys. Generally, the only personal contacts allowed during all the time were two hours per week at the Center. And even that was curtailed by Judge Barsamian, in the case of Mrs. Amer and Mohammed-Ali because of Mohammed-Ali's alleged "anxiety" towards Mrs. Amer. Nevertheless, a strong relationship exists between the Amers and their children. (T 12/16/88 at 1619)

All visitation ceased with the January 9, 1989 order of Judge Barsamian. No incident of any consequence ever occurred in the three years of weekly visits between the Amers and their children and the Court's findings and order refers to no evidence of any reason to bar visitation pending appeal except the unalterable plan to terminate the relationship of parents to children. On February 6, 1989 the Probate Court denied a motion to stay the termination order so that the weekly visitation by the Amers with their children could continue during this appeal. The Probate Court took no testimony in connection with the denial of visitation pending appeal but just assumed despite a three-year history to the contrary, that the Amers would violate the Court's order and otherwise act violently if they continued to see their children. The Michigan Court of Appeals and the Supreme Court refused to reconsider this decision.

The Michigan Court of Appeals Opinion

The Court of Appeals concluded that the findings by the Probate Court were not clearly erroneous, concluding that there was nothing wrong with

reliance on findings at earlier hearings; nothing wrong with making refusal to confess prior to a finding by clear and convincing evidence the basis for termination; nothing wrong with unlimited long term foster care after a preponderance of the evidence hearing; nothing wrong with refusing to provide services to reunite a family until after confession. The Court of Appeals also relied on the evidentiary and ultimate findings of Judge Maher and Referee McKnight adopting the findings of Judge Barsamian.

How Did Samier Die?

How then did Samier die? How did he suffer a single internal fracture with not a single exterior mark, except an inconsequential bruise on the cheek, which resulted in his death? Many children mysteriously die. Crib death for years was unexplained. They sometimes choke on food. They suffocate. Children die sometimes from unexplained fires. They sometimes fall and die. Middle class Americans are not usually accused of child abuse under such circumstances. Parents ought not to be presumed to be "killers" of their child when they can't explain a death, and all the circumstancial evidence points to a loving, caring, normal, family. After all, Mrs. Amer was acquitted of the criminal charge against her. Drs. Kanluen and Sarmiak hypothesized enormous force and a blunt instrument without making a sophisticated medical evaluation of the health of Samier as was done in the *Martin* case, *supra.* No postmortem tests for bone disease were done. Even they could not explain the absence of any corroborating sign that such force was used. Even they thought an accident was possible. Dr. Fischoff thought the manner of death was questionable and hazy. The best explanation for the tragedy that befell Samier was that this was a bathtub accident, that Samier suffered from some form of bone disease, similar to that of Ashley Martin, and died though a normal child might have survived. Perhaps it was osteogenesis imperfecta or temporary copper deficiency. The probability of disease is more likely than not, given the circumstances of Samier's life. A medical explanation described in medical journals is annexed describing bone disease and the difficulties of a differential diagnosis. These materials were presented to the Michigan Supreme Court but were not before the Probate court. (See Lodging 2)

ARGUMENTS FOR ALLOWANCE OF THE WRIT

If the decision below stands, for the rest of their lives, the Petitioners will experience the permanent termination of their parental rights to Mohammed Ali, Suehier, and Zinabe as recurring deaths of their children. They will ask over and over again, as they ask now: "How could such injustice happen to them in America?" To the children, a shattered culture, a torn bond

with real parents will remain raw, misshaping their destinies until the end of their days. Legal argument and public importance aside, the human catastrophe which this proceeding involves should prompt this Court to examine this matter with extraordinry care. This is the wrong era for the Amers to have had a child who died from an inexplicable fracture. The newspapers howl with stories of abused children. There are not stories of children wrongfully removed from parents. And there are stories of terrorism, hostages, and volatility concernilng those of Arabic descent. There are not stories of devoted parents, devout, law abiding.

A Fundamental Right

The Michigan parental, termination procedure which this Petition challenges is at odds not only with *Santosky v. Kramer, but with the formula of Mathews v. Eldrige,* 424 U.S. 319; 96 S.Ct. 893; 47 L.Ed 2d 19 (1976). In Michigan it is the adjudication stage, the preponderance of the evidence state that casts the die. The findings at this early stage rule the termination stage. Such findings were the basis for providing no services towards reuniting the family. Providing for open ended temporary foster care can only exacerbate familial relationship stress from which adverse inferences can be drawn. Relying on confession as the test for a fit and proper home creates an insurmountable burden for the innocent. Thus the private interest at the adjudication stage is the equivalent of the private interest at the termination phase; the risk of error is greter at the adjudication stage because the criteria is more general and the point is merely to take jurisdiction over the child. It is not legal theory which fires this argument. It is the reality of litigation in which the deck is stacked.

Michigan law relating to temporary foster care and permanent termination was amended in 1988. The amendments leave in place the procedures challenged by this Petition. In fact, Michigan law now diverges even farther from a due process standard than that applicable to the instant case. MCL § 712A.19(b); MCR 5.974(D) A child without proper "custody or guardianship" (b)(1) or in an "unfit home" "by reason of neglect, cruelty, drunkenness, criminality, or depravity" comes within the jurisdiction of the Probate Court. MCL § 712A.2(b)(1)2). Foster care of unlimited duration may ensue, MCL § 712A.18, with periodic review at not less than 91-day intervals during the first year after disposition MCL § 712A.19(e3), and then at 182-day intervals. MCL § 712A.19(2) As for permanent termination, if the parent was a "respondent" at a first stage jurisdictional hearing and more than 182 days have elapsed from a dispositional order and "the court finds by clear and convincing" evidence that: (See Appendix O-25)

Physical injury of a child, "caused" *even without fault* by the parent, or not prevented by a parent can result in permanent termination if there is a "reasonable likelihood" of injury in the foreseeable future. MCL 712A.19b (3(b))(i). See *Jacobs v. Smith*, 433 Mich 24, 444 N.W.2d 789 (1989). Findings at the jurisdictional stage of this proceeding are conclusive at the termination stage. The failure to confess to intentional wrongdoing found at the jurisdictional phase is clear and convincing proof that innocent parents are unable to provide proper care and custody within a reasonable time for a child. Unexplained health difficulties of one child per se, constitutes clear and convincing evidence sufficilent to warrant termination of parental rights as to others who are healthy. *In the Matter of Mohammed Ali Amer.* (Appendix A, June 12, 1990)

Ohio law appears to be much more in line with the requirements of due process. There, an adjudication that a child is abused, neglected or dependent requires clear and convincing evidence at the first stage of the child protection proceeding. Ohio Revised Code 2151.35. Long term foster care specifically requires a finding by clear and convincing evidence that it is in the best interest of the child. Ohio Revised Code 2151.35.3. Diligent and good faith services provided toward reunification are a necessary precondition for termination. Ohio Revised Code 2151.41.4(E)(1); *In re Lay*, 539 NE 2d 664 (1987). Findings at one stage of a proceeding cannot be used at another stage. *Elmer v. Lucas County Children's Serv. Bd.*, 523 NE 2d 540 (Ohio App 1987). In Tennessee, where temporary foster care can be of unlimited duration, the finding that a child is dependent or neglected requires clear and convincing evidence. Tenn. Code Ann. 37-1-129. In the event temporary foster care exceeds one year, and it is in the best interest of the child, parental rights can be permanently terminated. Tenn. Code Ann. 37-1-147 See *State Department of Human Services v. L.D.*, 6568 S.W.2d 112 (1983). Kentucky on the other hand follows a system much like that of Michigan, temporary foster care of unlimited duration based upon a preponderance of the evidence. Ken. Rev. Stat. 620.090(5); 620.080. Whether the other elements of Michigan's practice are followed in Kentucky is not evident .

Clear and Convincing

In *Santosky v. Kramer*, 455 US 745 (1982), this Court said: "Before a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the state support its allegations by at least clear and convincing evidence." This result flowed from the "Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."

In termination proceedings, the risk of error is too great if only a preponderance of the evidence standard applies: (See Appendix O-26) The use of the clear and convincing standard in termination proceedings was again explained in *Riviera v. Minnich*, 483 US 574 (1987). (See Appendix O-27)

The *Santosky* standard flows from the value society places on the integrity of the family — earning it the protection of a fundamental right. *Stanley v Illinois*, 405 U.S. 645 (1973); *Griswold v Connecticut*, 381 U.S. 479 (1965). A parent's right to custody ofher child is one that is "far more precious . . . than property rights." *May v Anderson*, 346 U.S. 528, 533 (1953).[5]

On June 25, 1990, this Court decided the case of *Cruzan v. Director, Missouri Department of Health*, U.S. ____, 101 S.Ct. 2841 (1990) The clear and convincing standard of *Santosky v. Kramer, supra*, was considered. This Court noted in *Cruzan* that the higher standard was required because there was no turning back from an erroneous decision, drawing an analogy to the parental termination of *Santosky*. Clear and convincing has been defined to mean that the party with the burden of persuasion may prevail only if he can "place in the ultimate factfinder an abiding conviction that the truth of his factual contentions are highly probable." *Colorado v. New Mexico*, 467 U.S. 310 (1984) The Pennsylvania Supreme Court has defined clear and convincing to mean "testimony that is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without

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[5]The importance of the right has been recognized by 25 U.S.C. ____, and by MCR 5.980(D) which require that parental rights of American Indians can be terminated only by proof beyond a reasonable doubt, but all others, including these Petitioners of arabic descent can lose their children by clear and convincing evidence. The "equal protection" clause of the United States Constitution, Amendment XIV, generally does not permit classification based on race. See *Palmore v Sidoti*, 466 U.S. 429; 104 S.Ct. 1879; 80 L.Ed 2d 421 (1984). Strict scrutiny is usually applicable. Native Americans have been exempted from strict scrutiny because classifications favoring Native Americans have not been deemed racial in character. In *Morton v. Moncari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed 290 (1974) although the discrimination was sustained, its rationality was clear and the Court majority noted at note 24, that the preference applied to tribes, but not those who merely "are recially to be classified as 'Indians'. It was not "racial". Michigan law on the other hand is racial in nature. cf. *Washington v. Yakima*, 439 U.S. 463, 99 S.Ct. 740, 58 L.Ed 740 (1978); *Fisher v. Dist. Court*, 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed 106 (1976). With a fundamental right at stake, involving the permanent severing of children from their culture and their family, the policy behind the higher standards for Native Americans applies equally to Arab Americans and thus the distinction between Native Americans and others is without any rational basis if that be the test.

hesitancy, of the truth of the precise facts in issue." *Matter of Sylvester*, 521 Pa.300, 304 555 A.2d 1202, 1203-04 (1989) If the words clear and convincing mean clear and convincing, if we regard the permanent severance of children from parents as one of the most significant intrusions by the state upon lives of citizens, then the record below does not support such a drastic step. The Amers' parental rights have been unjustly terminated as a result of the Probate Court's adherence to at least three irrebuttable presumptions: (1) a child who suffers from unexplained fractures resulting in death was "killed" by the parents and have an unfit home for their remaining children; unless (2) they confess to having abused the child. (3) The third presumption is that the State's obligation to provide services is satisfied if no services are provided until parents confess to a crime. The existence of these presumptions ob literated the State's heavy burdern of proof and deprive the Amers of Due Process of law in violation of the United States Constitution, Amendment XIV.

Irrebutable Presumptions

Where a liberty interest is at stake, Due Process narrows the use of presumptions since they result in a shift of the burden of proof. *Francis v. Franklin*, 471 US 307 (1985). See *Washington County Department of Social Services v. Mary Alice Clark*, 296 Md. 190; 461 A.2d 1077 (1983) wherein the Court of Appeals of Maryland, in strikilng the state statute, found the statutory presumption which ensued when a child was in foster care 2 years a due process violation.

In effect, the Court below placed the burden of proof upon the parents to prove at a termination proceeding which allowed no evidence as to essential facts found at an earlier hearing, that the ultimate finding to terminate their parental rights was wrong; unless they confessed wrongdoing of that which they denied, of that which they were found innocent, under circumstances where their innocence is more likely than guilt. The Court of Appeals stated that parents can be required to come forward with evidence that the family situation has improved. The Probate Court and the Court of Appeals equated confession of guilt with going forward. In this case, in effect, an impossible burden of proof was placed on the parents because they were innocent. If they were guilty, and would truthfully confess, presumably the children would have been returned.

Confession and Fifth Amendment

Not every parent who refuses to admit intentionally harming a child who is injured is lying, or into denial. They may be innocent notwithstanding

a preponderance of the evidence jurisdictional finding of abuse. There apparently is a growing tendency to terminate parental rights of those who insist on their innocence because a refusal to confess guilt is deemed clear and convincing evidence of permanent unfitness. The extent of this practice may be more widespread than the reported cases indicate. *Dutchess County Dep't. of Soc'l. Serv. ex rel. T.G. v. Mr. G.*, 534 NYS2d 64, 69-70 (Fam. Ct. 1988) Permanent termination of parental rights to children placed in *temporary* foster care, after a preponderance of the evidence hearing, because parents insist on their innocence *before* the clear and convincing temination hearing, and the circumstances of the harm are open to unsubstantiated speculation; and in the only criminal case brought, the parent is found "not guilty", has no rational basis. Whether it violates the due process right not to be forced to incriminate onself, or it violates due process because it is irrational, the insistence upon coercing a confession from the Petitioners in this case is shocking. This is so because it occurred after *Martin, supra. In Re Martin, supra* at 731-32.

In *Martin*, Ashley Martin, also about three months old, was made a temporary ward of the Probate Court after a phsyician detected numerous broken bones and a Petition was filed. Despite their steadfast denial that they had abused Ashley and the presentation of evidence that Ashley may have had a medical disorder which made her susceptible to bone fracturs, a Probate Court jury found enough to place the child in temporary foster care. *Id.* at 719. Three years later, despite the opinion of at least two therapists that it would be safe to reintegrate Ashley into the Martin home, she remained under foster care. This was due to respondent-parents' refusal to accede to the demand of state-employed social workers that they "accept responsibility" for their daughter's injuries. *Id.* at 721, 728.

To require the Amers to confess or acknowledge that they had abused their son would place them in jeopardy of permanent parental termination pursuant to MCL § 712A.20(d); MSA 27.3178 (598.20d) and criminal prosecution under MCL § 750.135; MSA 28.330, and MCL § 750.136; MSA 28.331; as well as a prosecution for perjury. Regardless of the purported justification for requiring confession, such a requirement violates the Amers' Fourteenth and Fifth Amendment privilege against self-incrimination. That the Amers testified at various hearings is beside the point, because the Petitioners did not refuse to testify. They refused to testify falsely in the manner in which the Respondents wished, under threat of permanently losing their children.

The broad application of the privilege against self-incrimination reflects this Court's disdain for coerced confessions. In *Lefkowitz v. Cunningham*,

431 US 801; 97 S Ct 2132; 53 L Ed 2d 1 (1977), this Court held that a New York statute requiring an officer in a political party to testify pursuant to a subpoena or lose his office violated the Fourteenth Amendmnent and Fifth Amendments. The Court reasoned that: (See Appendix O-29)

Thus, the threat of direct economic sanctions or forfeitures supplies an inadequate basis on which to revoke the privilege of the Fifth Amendment. Surely, the loss of parental rights is even more compelling. A number of state courts have dealt with the foregoing issue.

The Supreme Court of Minnesota held that the refusal of parents to comply with a trial court requirement that they confess guilt and explain the death of their nephew, could not be the grounds for termination of parental rights to two unharmed children. The requirement violated their Fifth Amendment rights. *Matter of Welfare of J. W.*, 415 N.W.2d 879 (Minn. 1987). However, the court went on to state "Therapy, however, which does not include incriminating disclosures, may be ineffective; and ineffective therapy may hurt the parents' chances of regainilng their children." This is only an "assumption." In the case at bar it was a presumption. *In re Jessica b.*, 254 Cal Rptr 833 (Cal. App. 5 Dist. 1989) approved the practice of requiring confession after a dependency hearing subject to a clear and convincing standard of proof. Welfare and Institutions Code of California § 361. The evidence of abuse was substantial, and there had been a criminal conviction. All that was at stake was unsupervised visitation. Under California law there was no threat of self incrimination. The court concluded: "William's failure to admit fault indicates that he is neither cooperating nor availing himself of the services provided." at 891. *Dutchess, supra,* was a permanent termination procedure. Despite two findings that the parents had sexually abused their son, the parents maintained their innocence. The only issue was whether the refusal of the parents to admit in counseling that they committed incest can be the basis for termination of parental rights. There were two findings in prior hearings that the child was in fact sexually abused by the parents. The state argued that without an admission that they committed sexual acts on the children "there can be no meaningful treatment." 534 NYS 2d 64 (1988). Despite total compliance with the dispositional order, including counseling, group treatment, regular visits with the child and powerful expert evidence that the parents were not a danger to the child, the court terminated their parental rights finding that without admission of guilt, the evidence was clear and convincing that the parents had failed to plan for the child and therefore termination was proper. 534 NYS 2d 69. In New York, temporary foster care is of unlimited duration, Family Court Act § 1055, based on a preponderance of the evidence. Family Court Act § 1046(b).

Permanent termination requires clear and convincing evidence of the best interest of the child. Social Services Law sec 384(b).

This Court recently held in *Baltimore City Department of Social Services v. Bouknight*, 110 S.Ct. 900, 907-909 (1990) that there is no Fifth Amendment privilege to refuse to produce a child, the "particular object of the State's regulatory interest". *Bouknight* is clearly distinguishable from Petitioners' case. The Respondent here imposed a verbal admission of guilt as a therepeutic technique under pain of parental termination, not to prevent an ongoing danger to a child.

The Michigan Statutory Scheme for Terminating Parental Rights was Unconstitutional on its Face

MCL § 712.19a; MSA 27.3178 (598.19a); MCR 5.965, MCR 5.972 and MCR 5.974 are unconstitutional on their face and as applied in that they sanction permanent termination of parental rights without a prompt and meaningful hearing, permitting indefinite long term temporary foster care, and uncircumscribed bureaucratic and judicial discretion as described above, thereby undermining the due process clause of the U.S. Constitution Article XIV and the clear and convincing evidence standard of *Santosky v. Kramer*, 455 U.S. 745 (1982). MCL § 712A.19a(e) is not independent of the consequences of the preliminary hearing and determination. The preliminary hearing is really the dominant point in the proceeding. The standard there is "jurisdiction" by a preponderance of the evidence. By the time the State gets ready to terminate the parental relationship, it has had every opportunity to create its own case. MCL § 712A.19a(f) illustrates the point precisely, for there, the state need only prolong temporary foster care for more than two years to trigger an apparent shift in the burden of proof to the parents to prove a proper home or probability of proper home. A shift in the burden is impermissible under Michigan law but as a practical matter, it does just that.

One final point: in Michigan, the proof requirement in the termination phase is "clear and convincing." At the criminal trial of Rehab Amer, the standard of proof was of course beyond a reasonable doubt. A collateral estoppel approach should be applied because of two special factors: Judge Barsamian called the Amers "killers" and based her termination order, and visitation order, upon that. This very fact was adjudicated in favor of the Amers in the criminal trial of Mrs. Amer. Mr. Amer was never charged. Secondly, the difference between clear and convincing and beyond a reasonable doubt is so abstract, that in light of the absence of objective criteria

in the State of Michigan and in many other states, and in light of the severe consequences, the "not guilty" verdict in the criminal case should preclude any negative inference to be drawn from the death of Samier as a basis for permanent termination. They were not "killers".

The Respondents Violated Federal Statutes with Respect to Foster Care

State agencies are required to comply with the Adoption Assistance and Child Welfare Act of 1980[6] as follows: 42 U.S.C. Sec 671(a) 15 requires that the Department of Social Services make "reasonable efforts. . . (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from the home, and (B) to make it possible for the child to return to his home. . ." There is no evidence that this was attempted.

The Act also requires that a case plan be developed for each child. 42 U.S.C. Sec. 671(a) 16; 42 U.S.C. Sec. 675(1). A plan is defined as follows: The term "case plan" means a written document including at least the following: A description of the type of home or institution in which a child is to be placed, including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to carry out the voluntary placement agreement entered into or judicial determination made with respect to the child in accordance with Section 672(a)(1) of this title. It includes a plan for assuring that the child receives proper care and that services are provided to the parents, child and foster parents in order to improve the conditions in the parents' home. It should facilitate return of the child to his own home or the permanent placement of the child, and addresss the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan. The plan must be a written document available to the parent. It must include a discussion of how the plan is deigned to achieve a placement in the least restrictive setting available and in close proximity to the home of the parents, consistent with the best interest and special needs of the child. There must be a description of the services offered and the services provided to prevent removal of the child from the home and to reunify the family.

With respect to the Amer children, no attempt was made to reunify the family and the so-called "plan" was not that at all.

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[6]The text of the applicable federal law and regulations are contained in Appendix I.

The Probate Court Displayed Bias and Prejudice

Judge Barsamian characterized the Petitioners as "killers" prior to the termination hearing before hearing a word of testimony. The Court below plainly allowed her strong feelings to interfere. The Amers were really deprived of a fair and impartial hearing. For example, on February19, 1988, Judge Barsamian ordered the Amers to cease obtaining counseling or therapy from the social worker of their choice, Nancy Adadow Gray. Examples abound. (T 2/19/88 at 36) and (T 1/9/89) (T 12/13/88 at 1140-1141); (T 12/13/88 at 1179-1182, 1184-1186, 1189-1192); (T 12/1288 at 1024); (a-39) (T 1/12/88 at 19-31). In addition, the Judge barred any member of the Amer family from having temporary custody.

Allegations of child abuse obviously have a propensity to evoke powerful feelings. But this Court ought to go beyond even its own feelings so that great societal harm is not perpetrated. The seriousness of child abuse and the power of the State to sever children from families requires the highest standards of competence and the highest standards for ensuring that severance is indeed justifiable. This is the standard which the Fourteenth Amendment requires.

CONCLUSION

For the foregoing reasons, Petitioners Rehab Amer and Ahmed Amer respectfully request this Court to grant this Petition for a Writ of *Certiorari* to the Supreme Court or Court of Appeals of Michigan, and to reverse the permanent termination of their parental rights with respect to their children, Mohammed Ali, Suehier, and Ziabe.

Respectfully submitted,

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90-1282 (2)

Supreme Court, U.S.
FILED
DEC 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

Supreme Court of the United States

October 1990 Term

REHAB AMER and AHMED AMER,

Petitioners

v.

DEPARTMENT OF SOCIAL SERVICES,

Respondent

Appendix to Petition for Writ of Certiorari to the Court of Appeals of the State of Michigan

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX INDEX

Page

A. Opinion of Court of Appeals, June 12, 1990..... 2

B. Opinion of Judge Barsamian, January 9, 1989..... 16

C. Order of Termination, January 9, 1989..... 48

D. Disposition of Judge Barsamian, February 6, 1989..... 51

E. Opinion of Judge Maher, December 15, 1986..... 73

F. Order of Judge Maher, March 5, 1987..... 87

G. Opinion of Judge Maher, October 28, 1986..... 89

H. Opinion of Referee McKnight, September 4, 1984..... 108

I. Order of Michigan Supreme Court, July 31, 1990..... 124

J. Order of Michigan Supreme Court, September 28, 1990..... 125

K. Parent/Agency Agreement, June 24, 1986..... 127

L. Parent/Agency Agreement, (unsigned)..... 129

M. Excerpts from Criminal Trial..... 133

N. Litigation Chronology..... 150

O. Indented Quoted Material..... 153

APPENDIX A

S T A T E O F M I C H I G A N
C O U R T O F A P P E A L S

In the Matter of MOHAMMED ALI AMER, SUHIER AHMED AMER and ZINABE AHMED AMER, Minors.

DEPARTMENT OF SOCIAL SERVICES,

Petitioner-Appellee,

v No. 114910

REHAB AMER and AHMED AMER,

Respondents-Appellants.

Before: Gribbs, P.J., and Cavanagh and R.B. Burns,* JJ.

PER CURIAM.

Respondents appeal as of right the order of the probate court terminating their parental rights to their three children, Mohammed Ali (date of birth December 11, 1982), Suehier Ahmed (date of birth November 18, 1983) and Zinabe Ahmed (date of birth

December 9, 1986). This order was based on the probate court's finding by clear and convincing evidence that a statutory basis for termination had been established, MCL 712A.19a(e) and (f); MSA 27.3178(598.19a)(e) and (f), and that termination was in the best interest of the children. See MCR 5.974. We affirm.

In this appeal, the parents argue that the probate courts decision did not include specific findings of fact, failed to articulate the requisite statutory basis for termination, and was not supported by clear and convincing evidence. We disagree.

According to the record and the probate court's factual findings, this dispute started in 1984 when the Department of Social Services filed a petition with the probate court alleging abuse of Samier Amer, Suehier Ahmed's four-month old twin brother. Samier had human bite marks on both heels, neck and left side of the stomach, and also had fractures to the right humerus, the left

clavicle, the left upper tibia, and the distal and middle left femur. The five fractures were all in different stages of healing. Samier was also diagnosed as failing to thrive. The petition alleged that the respondents were unable to explain Samier's injuries. Doctors did rule out any metabolic disturbances, disease or deficiency as the cause of the fractures.

On March 27, 1984, an order for temporary custody of Samier was entered by the probate court. Samier was subsequently made a temporary ward of the court after the court determined that it had jurisdiction and that the allegations made in the petition had been substantiated. At this time, a treatment plan was designed for the parents.

The parents were subsequently given a psychiatric evaluation and, at a statutory review hearing, a return of Samier to the parents' care was not recommended. The examining doctor concluded that because the parents could not admit responsibility for

Samier's condition or show concern, there could be no change in their behavior and Samier would remain at risk.

At a statutory review hearing held on October 18, 1985, the same examining doctor changed his position and recommended that Samier be returned to the parents' home with continued monitoring. The change in position was based on the doctor's assumption that the parents had accepted responsibility for their conduct even though they had never openly admitted that they had abused Samier. The probate court ordered extended visitation in the family home. One month later, on November 22, 1985, Samier was dead.

The department of Social Services immediately filed a petition requesting the probate court to assume jurisdiction over the respondents' surviving children, Mohammed and Suehier, because of Samier's death while in his parents' care. At the hearing held on October 28, 1986, the probate court found that one of the respondents was responsible for the

nonaccidental death of Samier while the other parent failed to protect the child. The court also found that the parents' decision to seek medical treatment for Mohammed three months after he started to experience chronic diarrhea was not what a rational person would do when taking care of somebody's medical needs. On October 31, 1986, the probate court entered an order making the children temporary wards of the court.

As to the circumstances surrounding Samier's death, the autopsy revealed that there was a fracture to the back of the skull and that death was caused by head injuries. The fracture was the result of a blunt force injury to the head. There was a single impact and the pattern and extent of the injuries indicated that Samier's head had been moving at a great velocity when it struck a fixed object. In the pathologist's opinion, a slip and fall in the bathtub - the explanation offered by the parents - could not have caused the injuries. The pathologist thought that

Samier would have had to have been swung to generate the velocity needed to cause this type of injury because the contusion to the brain was on the opposite side of the impact. This witness' testimony was corroborated by the testimony of the director of pediatric intensive care from Children's Hospital.

As to the parents' explanation of Samier's death, the court compared the testimony of the emergency room doctor, the nurse, the police, and the EMS members with the mother's story and found numerous inconsistencies. The judge was convinced that the mother "orchestrate[d] what would sound best to the Court, as opposed to what really happened." The court went on to find that one of the parents had caused the death of the child while the other failed to provide protection.

At the hearing held on December 15, 1986, the court decided that the children were to remain in foster care and that family therapy was to continue with the return of the

children the ultimate objective. All three children were now involved because of the birth of Zinabe Ahmed on December ninth.

In subsequent proceedings, medical personnel who evaluated the parents testified to their belief that therapy that failed to deal with Samier's death would not prove helpful in rehabilitating the family. The parents would not admit to the abuse and it was felt that they had to address this issue before the other children could be safely returned to the family home.

On December 16, 1987, the Department of Social Services filed a petition requesting the permanent termination of the respondents' rights to their children in part because they had refused to accept responsibility for the nonaccidental death of Samier. During the dispositional hearing, the medical personnel repeated their belief that the respondents needed to acknowledge the child abuse before there could be a meaningful change in their parenting behavior. The medical experts were

convinced that a repeat of what occurred to Samier was possible. Furthermore, the parents' inability to deal with the abuse after years of therapy indicated that the family was untreatable. Denial had become fixed. Nothing more could be done for the family and a permanent solution was in the best interests of the family and a permanent solution was in the best interests of the children. The probate court found this testimony persuasive and on January 9, 1989, entered its order terminating the parental rights of Rehab and Ahmed Amer.

In termination cases, this Court reviews the probate court's findings under the clearly erroneous standard. In re Cornet, 422 Mich 274, 275; 373 NW2d 535 (1985). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. In re Miller, 433 Mich 331, 337; 445 NW2d 161 (1989). A decision to terminate is proper if there is

clear and convincing evidence of present neglect or a serious threat of neglect in the future. In re Parshall, 159 Mich App 683, 689; 406 NW2d 913 (1987), lv den 428 Mich 909 (1987). Because all the hearings constitute one continuous proceeding, evidence admitted at one hearing is considered evidence in all subsequent hearings. In re LaFlure, 48 Mich App 377, 387; 210 NW2d 482 (1973), lv den 390 Mich 814 (1973). And how a parent treats one child is probative of how that parent might treat other children. Parshall, supra.

By statute,

> Where a child remains in foster care in the temporary custody of the court following the initial hearing provided by section 19 [MCL 712A.19; MSA 27.3178(598.19)], the court may make a final determination and order placing the child in the permanent custody of the court, if it finds

any of the following:

***

(e) The parent or guardian in unable to provide a fit home for the child by reason of neglect.

(f) The child has been in foster care in the temporary custody of the court on the basis of a neglect petition for a period of at least 2 years and upon rehearing the parents fail to establish a reasonable probability that they will be able to reestablish a proper home for the child within the following 12 months. [MCL 712A.19a(e) and (f); MSA 27.3178(598.19a)(e) and (f).]

After a careful review of the record, we are of the opinion that the probate

court did make specific findings of fact, that these factual findings established the statutory basis for permanently terminating the custody rights of the parents, and that the evidence in support of these decisions was clear and convincing. The court entered detailed findings of fact and conclusions of law. The parents' failure to address their problems while in therapy and their treatment of Samier demonstrated their inability to provide a fit home by reason of neglect and their inability to reestablish a proper home. MCL 712A.19a(e) and (f); MSA 27.3178(598.19a)(e) and (f).

Respondents rely on In re Bedwell, 160 Mich App 168, 176-177; 408 NW2d 65 (1987), to argue that termination based solely on their failure to follow the treatment plan by admitting their guilt is not proper. To begin with, the probate court did not terminate respondents' rights solely because they failed to comply with the treatment plan. The physical abuse and death of Samier was clear

and convincing evidence of neglect sufficient enough to terminate the parents' custody rights in the absence of any proof that this behavior would not occur again. The probate court found the parents unfit and likely to remain that way after three-and-a half years of treatment. there was clear and convincing evidence to support this finding.

The respondents also make a number of arguments in an attempt to persuade this Court that their rights to equal protection and due process were violated. Apparently, the respondents' right to equal protection were infringed upon because the standard of proof used in this case is not as strict as the one used when an American Indian family is subjected to the same proceeding. We do not find this argument persuasive. Respondents' equal protection argument has been made before and rejected by a panel of this Court. See In re Miller, 182 Mich App 70, 75; ___ NW2d ___ (1990). We agree with that decision.

The respondents' rights to due

process were allegedly violated because (1) there was an impermissible shift of the burden of proof, (2) the requirement of an admission of guilt violated respondents' right to remain silent, (3) the DSS did not comply with the federal policy of family reunification, (4) the DSS manual was not followed and finally because (5) the probate court exhibited a bias and prejudice against the respondents.

As to the impermissible shift of the burden of proof, the respondents can be required to come forward with evidence that the family situation has improved and this obligation does not violate due process. See In re Miller, 433 Mich at 344-345.

We decline to address the respondents' Fifth Amendment argument in depth for a number of reasons. This issue was never raised at the trial court level where appropriate steps could have been taken to address the problem. Issues first raised on appeal need not be reviewed by this Court. Ledbetter v Brown City Bank, 141 Mich App 692,

702-702; NW2d (1985). In addition, in light of the reasoning behind this Court's decision in In re Johnson, 142 Mich App 764; ___ NW2d ___ (1985), we do not believe the issue has merit.

We also reject the respondents' contentions that the steps taken by the probate court do not comply with federal policy of the DSS manual. It appears from our review of the record that reasonable efforts were made to reunite this family. It is also apparent from the record that the behavior of the probate court did not evidence a bias or prejudice that would entitle the respondents to a new trial.

Respondents' final challenge addresses the constitutionality of the probate code. This challenge has also been previously made and rejected by this Court. See In re Martin, 167 Mich App 715; 423 NW2d 327 (1988) and In re Gentry, 142 Mich App 701; 369 NW2d 889 (1985).

Affirmed.

Roman S. Gribbs /s/

Mark J. Cavanagh /s/

Robert B. Burns /s/

APPENDIX B

Detroit, Michigan

January 9, 1989

EXCERPT

THE COURT: Based on the information provided to the Court through testimony and written documents produced as evidence, the court makes the following findings relative to this matter, dealing, of course, first with the petition requesting rehearing for purpose of termination of parental rights. The court would also note that in addition to the testimony and written documentation produced into evidence and of the exhibits, the court also had opportunity to review the legal file and the social file in this matter, which are considered to be reflective of the history of this case. In doing that, the court found

that the significant events in this case are as follows:

That, following that a detaining order was requested on March 27, 1984, relative to the child Samier Amer, who was born on November 18, 1983. And it was granted pursuant to a 3200 filed by Oakwood Hospital. And the child was at that point detained at Oakwood.

On March 28, 1984, a preliminary hearing resulted in an authorization of the petition, and placed the child in emergency shelter care or with suitable relatives, if any, under the Department of Social Services supervision. The case was continued to pretrial on Referee McKnight's docket for April 16, 1984, and probable cause was waived.

On April 2, 1984, a petition was filed alleging abuse of the child Samier Amer, who it alleged was four months old, had human bite marks on both heels, neck and left side of the stomach, had injuries described as fractures to the right humerus, the left

clavicle, the left upper tibia, and distal, and mid-left femur. There were five in all of different ages, and was diagnosed as also failure to thrive. The petition further alleged that the parents were unable to explain the injuries, other than to indicate a babysitter, who they refused to name, and the child's one-year old brother caused the bites. Doctors had ruled out metabolic disturbances or disease or deficiency.

On September 4, 1984, Referee McKnight found that the allegations contained in the petition filed on April 2, 1984, had been substantiated, and recommended that the child Samier Amer be made a temporary ward of the court, continued in temporary custody of his aunt, under supervision of the Family Treatment Unit, and the case continued to October 31, 1984, for further dispositional testimony. An order to effect that was entered on October 17, 1984.

On November 26, Referee McKnight completed the dispositional hearing, and

recommended an order be entered placing Samier in the home of his maternal grandmother, and requiring the parents to participate in a treatment plan specified as follows:

One, that the mother and father be seen at the Clinic for Child Study and followed through with its recommendations. Two, that the mother and father be involved in parenting classes. Three, that the mother and father, if required, be involved in counseling with Miss Ellen Rumman at the International Institute, or other appropriate agencies, until terminated by the therapist. Four, that the mother and father visit the child under the supervision of the Family Treatment Unit, with phased-in visitation to be allowed, if at all, only after clinic evaluation. An order to that effect was entered December 18, 1984, and the case was continued to May 1, 1984, for statutory rehearing.

On October 18, 1985, the first statutory rehearing was completed by Referee Chester Drake, who had replaced Referee

McKnight. And he found that it would be contrary to the child's welfare to be returned to this parents, and recommended the child continue as a temporary ward, placed with the maternal grandmother under the supervision of the Family Treatment Unit, and the case continued to the next statutory review on March 11, 1986. Referee Drake further recommended visitation be extended to seven days a week until the next stat, under supervision, two days a week individual therapy and family counseling. And an order to that effect was entered on October 25, 1985.

On November 22, 1985, an order to take into custody was issued for Mohammed Amer, born December 11, 1982, and Suehier Amer, born November 18, 1983, the twin of Samier. On November 25, 1985, a preliminary hearing was begun by Referee Weberman and continued to December 2, 1985. And on December 2, a petition was authorized as to Mohammed and Suehier, and pretrial was set for

December 13, 1985, before Referee Drake, and the children were ordered placed in emergency shelter care under supervision, with visitation only under the Department of Social Services supervision.

On December 5, 1985, a petition was filed that alleged that the home environment was not fit for the children Mohammed and Suehier Amer, because on November 21, 1984, their sibling, Samier, a two-year old, was brought to the hospital with no vital signs. His extremities were rigid. He had green stool. And his hair and body and diaper were dry. The child was diagnosed as clinically brain dead and put on a resuscitator. The mother stated she had all three children in the bathtub and was running water for them when she heard the phone ring. She went to answer it and heard a thump. She found Samier on his back in the water up to his ears. There was a bruise on the child's cheek.

In March of 1984, Samier was made a temporary ward of the court due to abuse, and

had been returned home on October 18, 1985.

On December 13, 1985, Referee Drake disqualified himself because of his prior involvement in returning the children to the parents. And so the matter was then on December 17, 1985, assigned to Mary Ann Quinn, as Referee Drake's alternate.

And then on December 17, 1986, a judge demand was made by attorney for the respondents, and the matter was assigned to Judge Martin T. Maher.

On March 26, 1986, a petition to amend the petition was filed by the children's attorney, Mr. William Ladd, to add the following: That Samier Died on November 232, 1985, at Children's Hospital. An autopsy concluded that cause of death was a homicide. That mother was arrested and charged with second degree murder and bound over to the Circuit Court. That Samier had been a temporary ward of the court based on physical abuse. That the parents previously reported to the medical personnel that the child Samier

had problems feeding. That they on occasion had to force feed him, and that he was a difficult child who was different from his siblings. That throughout the family involvement with the court the parents had insisted that their problems with Samier were peculiar to that child. That, however, the oldest child, Mohammed Ali Amer, had been admitted to the Botsford Hospital in August 1983 for gastroenteritis. During that time the child was in the hospital the parents attempted to force feed the child, despite instructions from medical staff that this was not good for the child. The parents also said that Mohammed was a bad baby due to his infancy. The child Suehier was eventually examined at Children's Hospital. X-ray indicated evidence of old trauma to the child's left tibia.

On May 12, 1986, a preliminary hearing was held before Judge Maher, and at that time he entered an order setting the case for trial on June 26, 1986, requiring the

parents to reimburse the county in the sum of $450 for attorneys, at $25 a week, and pay $96 a week to the State for the children's maintenance. Further, the children are to be transported to the hospital for examination by Dr. Magagorski, and report to be provided to the court. Cost for report and examination to be paid by the parents. All visits of parent and children to be in the a.m., and the department to maintain religious continuity, i.e., mosque services and diad. That order was entered May 16, 1986.

On June 13, 1986, a petition for clarification and enforcement of the court's order of May 12 was filed by Attorney Harold R. Goldberg in behalf of the respondents, regarding failure of the Department to allow children to attend religious services at the Mosque of the parents and placed in an Islamic foster home, if one could be found that's appropriate. On June 17, 1986, Judge Maher held a hearing on the motion and denied the motion, and continued the matter then for

trial to September 10, 1986.

the matter was ultimately heard in terms of adjudication by Judge Maher on October 28, 1986, where he found that the allegations contained in the petition had been substantiated, and ordered that the children be placed in the temporary custody of the court and the case continued to December 15, 1986, for disposition. The children were to continue in the foster care under the Department of Social Services supervision, and the parents referred to the clinic. An order to that effect was entered on October 31, 1986.

On December 2, 1986, a motion to replace the attorney for minor children, and a motion for dismissal, and a motion for evaluation of the natural parents was filed by Attorney Lawrence Strauss for the parents. The motion to dismiss was based on the fact that the parents were found not guilty in Circuit Court. That the parents have followed the recommendation of the Department of Social

Services. And that numerous complaints regarding standard of care by the foster parent, which have not been addressed appropriately by the Department. And on December 3, 1986, Attorney Strauss withdrew the motion.

On December 10, 1986, an order was entered placing Baby Girl Amer, born December 9, 1986, in foster care of emergency shelter care. In transferring the jurisdiction from Oakland County to Wayne County, the child at that point having been born in the hospital that was located in Oakland County.

On December 12, 1986, a preliminary hearing was held by Referee Francis Pitts, who authorized the petition and continued detention and set the matter for pretrial on Judge Maher's docket for December 15, along with the other matter that was already scheduled for that day.

And on December 15, a petition in behalf of Zinabe Amer alleged a previous history relative to the other siblings was

filed. And a hearing relative to disposition was completed on that, however, and order was not entered on that day.

On February 11, 1987, a petition to move the matter to the docket of the presiding judge of the Juvenile Division was filed by the prosecuting attorney, at that point Judge Maher having been transferred to the Estates Division of the Court.

And then on February 26, 1987, a motion to suspend visitation was filed by the children's attorney.

Ultimately on March 5, 1987, a motion was entered by Judge Maher relative to the hearing on December 15, making, Zinabe, who was then a ward of the court in their current placement, which at that point was foster home. Judge Maher further ordered that the parents are to attend counseling and parenting classes. Parents are to give a list of relatives and/or Arabic homes for investigation for juveniles placement. That DSS and foster homes are to use the children's

Arabic names. That the family was to receive family therapy, with Mohammed Ali receiving individual therapy. And the matter was then continued for statutory review on March 10, 1987.

On March 5, 1987, the motion to remove the guardian ad litem was filed by respondents' attorney. March 6, 1987, all the motions that -- on March 6, all the motions that had been -- on March 6, 1987, a motion to reunite minor children with their parents forthwith and in concurrence with the petition to move the matter to the docket to the presiding judge of the juvenile division was filed by respondents' attorney. On March 10, 1987, an order was entered by Judge Barsamian granting the motion to transfer the case to the docket, and a hearing on the motion to suspend visitation of the parents, said guidelines between petitioner and DSS, reunite the children with their parents and remove guardian ad litem.

On May 7, 1987, an order was entered

denying the removal of the guardian ad litem, removing the guardian ad litem and continuing the case for further testimony.

On May 29, 1987, statutory rehearing was completed. And the court found that return of the children to the home of the parents would be contrary to their welfare, and ordered that they remain temporary wards of the court, which was again continued for review. At that time the court also ordered that the parents are to participate in therapy, their therapist selected by DSS of Wayne County or the Clinic for Child Study, to deal with and accept responsibility for the non-accidental death of Samier. That parents are to participate in Parents Anonymous. That parents are to meet regularly with Ms. Fine, who is to coordinate and monitor all treatment efforts both as to the parents and the children. That Mohammed is to continue individual therapy. And that the children are not to be placed with relatives. And that the mother's visits with Mohammed are terminated

until further order of the court.

On June 5, 1987, a motion to reconsider order relative to visitation of the minor child by the natural mother was filed on June 25, 1987. The court entered an order denying the motion to reconsider.

On December 16, 1987, a petition for rehearing was filed requesting permanent custody, and alleged the parents are unable to provide a home fit for the children by reason of neglect, and that the children would be neglected over the long term future, alleged the abuse and neglect of Samier. That Mohammed Ali, Suehier and Zinabe were made temporary wards of the court as a result of Samier's death, and placed in foster care, where they remain under DSS supervision. That although parents have consistently involved in therapy in order to accept the responsibility of neglect and abuse and failure to protect that led to Samier's death, they refuse to acknowledge who was responsible for the non-accidental death of Samier.

Then on December 23, 1987, a petition to have parents and minor children examined by independent mental health professionals was filed by Mr. Baum. And on January 8, 1988, a discovery motion was filed by Mr. Baum in behalf of the parents. On January 12, 1988, a hearing was held relative to the motion to have the parents and minors examined by independent health professionals, and a supplemental order of discovery -- that a supplemental order of discovery was entered. On January 14, 1988, the court entered an order denying having met mental independent health examination. On January 22, 1988, the statutory review was continued on February 19, 1988 for pretrial on the permanent custody petition.

On January 19, at the hearing relative to the pretrial on the permanent custody petition, the matter was set for hearing on May 13, 1988, along with the statutory review. And so we became then a two-track hearing, one dealing with statutory

review and the other one dealing with permanent custody.

It was at that time that the court ordered that Mrs. Nancy Gray was not to have any further therapy or counseling relationship with the parents, and nor was she to accompany them to their therapy sessions or to the Clinic for Child Study.

On May 2, 1988, Attorney Baum filed a petition asking for clarification and modification of order of the May 29, 1987. And subsequently a hearing was held wherein the court there specifically indicated to Mr. Baum, as well as to the parents, that the court meant exactly what it said, and further, tried to make as clear as possible what it meant by that order. And since that time there has been numerous hearings dealing with the termination of the parental rights.

When children are found to come within the provisions of the Juvenile Code, as you all know, those of you who are professionals in the court system, the court

has a number of options that it can consider in terms of dealing with the problem.

When Samier first came to the attention of the court, it was felt that because of the nature of the injuries and the severity that the child could not be allowed to remain in the custody of the parents, and therefore the court sought relatives, which is appropriate, rather than putting them with strangers. And was able then to find a couple of relatives who were willing to become involved and provide a home environment for this child, pending efforts by the Department to rehabilitate the parents.

It's very significant to the court that when the Department, then pursuant to the action of the court, developed a treatment plan, as Mr. Baum has indicated, which is goal oriented, identified specifically the goals that are to be achieved by the parents. The parents were extremely cooperative. The worked real hard. They were anxious. They were motivated. They were interested,

everything that we would hope to see in parents involved in these kinds of cases. The only thing they were not able to do, or refused to do, was to tell the court or any others that they dealt with as to how the injuries occurred to this child.

We're talking about a four-month old who could not have inflicted those injuries upon himself. And as hard as the professionals worked with these parents to get them to acknowledge how these injuries occurred, they failed in that respect. And but what happened here was that the professionals were so impressed with the efforts by the parents that, I guess, they agreed or decided that there had been experiential acceptance of responsibility without verbalization, as Mr. Baum has talked about on so many occasions in this case.

And I think that in his remarks and in his report, Dr. Schornstein indicated that while these people have not acknowledged the injuries, that they have done everything

that's been asked of them, and that as long as they continue to participate and be involved in that, it would be safe to liberalize their access to this child. And so based on that, the parents were given liberal access to this child, and within a month the child was dead. The medical examiner's report, which was dated November 27, 1985, said that Samier died of blunt forced injury to the head, causing stelit(??) fracture of the skull over the back of the head, bleeding in the head, and contusions of the brain. That there was one impact to the back of the head, the pattern, the extent of the injuries indicated that the head was moving at a great velocity and struck a fixed object, and the manner of death was classified as homicide.

Judge Maher, after listening to extensive testimony, came to the conclusion that Samier Amer was killed. That he did not fall in a bathtub, as had been stated by the parents. That this child could not have done this to himself. That it would have required

an adult to administer the injury that caused death.

Now in that house that night were only two adults, the father and the mother. And based on the testimony presented to Judge Maher, it is clear to me, in reviewing his transcript, that what Judge Maher found on that occasion that one of these parents killed their child intentionally, and the other one is protecting that parent. Because of that kind of a finding then, when the court intervened relative to the other children, the court cannot just ignore that which has transpired in the past. Perhaps if the case had initially came to the court as the death, the killing, that might have been more plausible or, you know, we all want to believe that parents can't do these things to their children. But in this case you had a severe injury, unexplained, cannot be caused by the child, and then the death. That could not have been inflicted by the child or the other children in the family,.

So Judge Maher, in the course of his disposition, set forth the guidelines that the court has read in terms of trying to achieve return of these children to the parent or parents. And what he basically did at that point was turn it over to the Department of Social Services and say here is what I want to see happen, and expecting the Department then to follow through on seeing that the treatment plan, again, which is goal-oriented, was followed.

And again, it seems that the parents have done everything we've asked them to do. And they've gone to Parents Anonymous. They have done everything, but one thing they have not done is that one goal set forth in Exhibit 5 relating to the acknowledgement of the killing of their child by one of them.

Now, in reviewing the testimony presented by the various professionals, and we've had many, all with a lot of experience, all well-intended. And I guess initially I was disappointed that the therapist that we

referred the Amers to wouldn't deal with the issue that they had been referred there to deal with, but instead, other issues were dealt with.

The depression, Mr. Baver talked about dealing with depression. Dr. Epstein talked about dealing with the stress, the grief problems of separation from other children, problems dealing with child care workers. They dealt with a lot of problems, but none of them related to the problem the court had sent the family there. And as I said, I kind of was disappointed in the therapy in not being willing to force the parents to deal with that particular problem, and where instead dealing with the multitude of other problems that obviously were beneficial to the parents. I don't doubt that. And perhaps in those respects they have changed. But I guess in reviewing my notes in preparation for this hearing and meshing the various professional's testimony together, it appears that none of the professionals expect

to be told what to deal with. That the clients who go there come with whatever they think they need to deal with, and that it is not their job, as I think one of them said, to be detectives or to pull from these people admissions of guilt or whatever.

But it is interesting to the court, as the court has pointed out at times, even though they were told -- I don't think I could have been anymore clearer to these parents. And by the way, language is not an issue here. I reviewed this file carefully. These people have been here a long time. They have assimilated to our society in many respects, and one way they have assimilated is through language. They can speak very well. And the court is very well impressed with their ability to communicate. So it's not a matter of them not understanding what I was telling them. I think I told them loud and clear what I wanted them to deal with, and yet they refused to deal with it.

Now, Mr. Baum, you asked me to

consider that they have experientially accepted responsibility about their actions, and that they do not need to verbalize that in order to benefit. I guess that was the theory under which the court operated the last time they gave Samier back to the parents. And in fact, Dr. Schornstein in his testimony indicated that that's what he had done. He felt that experientially the parents had accepted responsibility, and therefore, it was safe to return this child to the parents. And obviously that was not a correct assumption. And to expect the court at this time to accept that, in light of the history of this case, I think would not be appropriate.

I think that Mr. Derr, when he testified, indicated that there are indeed components here that can be dealt with by the parents. And maybe in dealing with the components, that you can deal with the problem at hand. However, he further said is that we don't know why this child died and how this child died, except for the general information

provided by the coroner based on his examination. And until we know and how this child died, we cannot know if the components that these parents are dealing with are indeed the components that are going to be safe to allow the safe return of these children.

Now, there has been a lot of discussion about the failure of the Department and the failure of the agency to provide a treatment effort to provide the sort of benign environment in which these parents can operate, and there being pointing out of numerous problems with the foster parents with Mohammed Ali, what he saw, what he didn't see. There's all kinds of issues that have been out there. And there are issues that are very -- cause a lot of concern for the court. And as Mr. Ladd said, if you deal with those specific individual issues, I think what can happen is you can get side tracked, because the bottom line here is that Samier Amer at four months sustained five fractures and bites on his body, and was a failure to thrive child. And

the parents were worked with, and the child returned, and within a month the child was dead.

One of the professionals -- and I forget which one -- indicated the best way to be able to predict the future is to look at the pattern of that past behavior. And there's nothing that I have seen here that would convince me that this would not recur. Basically nothing has changed. We continue to deny. Dr. Fischoff, who I think all of us are familiar with, indicated in his testimony that with five fractures and death, the children are at high risk. And if high risk, permanent custody and adoption is the preference.

I think I've tried. I think the Department has tried. But somehow -- and I think that others have tried, now, beginning with Ms. Rumman, Mrs. Gray, on through each in their own way have tried to assist these parents, and each has been unsuccessful in getting them to accomplish that one final goal that needs to be achieved.

I guess what happened here is what happens in many of our cases. Parents participate, they cooperate, they do whatever the court wants them to do, but they fail to internalize. They're unable to take what's been said to them and benefit by it. And I think that's what's happened here.

Now, as the court has indicated, we don't know who killed this child. We know that somebody killed this child. So while one parent is not as culpable as the other, but the other one, who is culpable, continues to support the one who is, and therefore, is not able to provide a safe environment for this child. And in fact, when the child Samier was returned after the first incident, was not able to protect that child. So that ultimately the child was killed.

So it's the court's belief that there cannot be return of these children to these parents short of verbalization of guilt, and that the experiential acceptance of responsibility has failed in the past, and

there is no reason to believe it's going to work in the future. And if we test that at this point, what we're doing is, we're testing at the risk of the life of Mohammed, Suehier, and Zinabe. And I think that's an inappropriate request on the part of this court as to those children.

So the matter comes before the court based on the unfitness of the parents, and it would appear based on our experience with them relative to the child Samier that they are unfit, and that after three and a half years of efforts by the court and by the Department, we have gained very little, and that they continue to be unfit, and that it is not very likely that things are going to change in the future. There's been absolutely no indication that if the court were to continue this matter into the future that they would change.

As you know, the first prong of this process is to determine the fitness of the parents. And the court would find that there is clear and convincing evidence that

paragraph (e) and (f) of MCLA 712.19(a) have been established. Then the court considers the best interest of the children in this case. And that was why I wanted the children referred to Children's Hospital, or the issue referred to the Children's Hospital, because I have a set of parents who are unfit, but if I were to terminate the rights of the parents would it cause great harm to the children. And if that were the case, then merely because the parents are unfit would require me to terminate their rights, but if I felt that it would harm the children, then I'd be willing at that point to continue to work with the parents, because at that point the children come first, and they come first in reality all along here. But if I felt that it were going to be tremendous harm to these children by terminating the rights of unfit parents, I wouldn't terminate.

But I am satisfied, after listening to Dr. Fischoff and others, and the therapist, Ms. Noel, for the child, that we're going to

have children who will have problems and will have far greater problems unless we do something to -- you know, unless we act quickly. We've already delayed substantially. That it would not be to the benefit of these children to linger in foster care.

I think the child who is most severely impacted at this point is Mohammed Ali. And efforts are being made to deal with him. And he seems to be making improvement, but he cannot make enough improvement unless there is support and consistency and no further conflict.

It would appear to the court that these children are entitled to a nurturing and caring and safe environment. That they are entitled not to linger in foster care. And they are entitled to permanency. Therefore, the court would find that their best interest require that there be some finalization here, and that termination of parental rights are in their best interest; therefore, the court will enter an order terminating the parental rights

of the parents to these children, and will commit them to the Michigan Children's Institute for appropriate adoption planning, and will advise the parents of their right to appeal the decision of this court to a higher court within 21 days. If they cannot afford counsel, counsel will be provided for them, as well as transcripts.

(Whereupon the above-entitled matter was concluded.)

APPENDIX C

In the Matter of:	Born
Mohammed Ali Amer	December 11, 1982
Suehier Ahmed Amer	November 11, 1983
Zinabe Ahmed Amer	December 9, 1986

At a hearing held on January 9, 19 89 ; and due notice of the hearing of the matter having been given as directed by the Juvenile Code, respondent(s) _____ did appear on the said date in Court.

THE COURT FINDS THAT BY CLEAR AND CONVINCING EVIDENCE THAT:

1. The allegations made in the (Petition for Rehearing) filed on December 16, 1987 pursuant to M.C.L. 712A. 19 a have been substantiated pursuant to subsections (e) and (f)

2. The placement of the child(ren) in the home is contrary to (their) welfare, and

3. Reasonable efforts have been made to prevent or eliminate the need for removal of the child(ren) from home; and these efforts have not been successful, and

4. Reasonable efforts have been made to reunite the family; and these efforts have not been successful.

5. The child(ren) will be neglected for the long term future.

THEREFORE, IT IS ORDERED THAT said child(ren) be, and (are) placed in the permanent custody of the Court; and all parental rights of ___ Rehab Amer and Ahmed Amer ___ are terminated and the child(ren) (are)

committed to the Michigan State Department of Social Services for admission to the Michigan Children's Institute. The Superintendent of Michigan Children's Institute is hereby named special guardian to receive benefits due the child(ren) from the government of the United States.

_____

Y. GLADYS BARSAMIAN

DATE: January 9, 1989

JUDGE OF PROBATE
JUVENILE DIVISION

APPENDIX D

Detroit, Michigan

Monday, February 6, 1989

Commencing at about 9:00 A.M.

THE COURT: This is in the matter of Mohammed Ali, Suehier and Zinabe Amer, Juvenile Court case number 84-241,317.

The matter before the court this morning is a Motion for Stay of Proceedings.

Counsel, would you identify yourselves for the record.

MR. GRODMAN: Howard Grodman, Assistant Attorney General, representing the Department of Social Services. And with me is Kim Sanford from the Department of Social Services.

MR. LADD: Bill Ladd from the Juvenile Defender Office on behalf of the children.

MR SCHWARTZ: Good morning, Your

Honor. Jeffrey Schwartz on behalf of the parents, who are present in court.

THE COURT: Counsel, would you waive the reading of the petition?

MR. SCHWARTZ: Yes.

Your Honor, on behalf of the parents I have brought a Motion for Stay of Proceedings for two reasons, although one may be moot due to a change in the court rules. However, the last stay that I filed concerning a permanent custody matter was not an automatic stay of the proceedings. And I understand that might be the case now. Either way, I filed the motion to preserve the record.

Your Honor, I'd like to indicate to the court that we're asking for a stay if proceedings for two reasons: Number one, so that any adoption proceedings would be stayed pending any decision by the Court of Appeals.

Number two, we would like to ask the court to reinstate the status quo concerning visitation pending the appeal for the reason,

with all due respect to the court, not all lower court decisions are in fact affirmed. That in the event the Court of Appeals feels it necessary to reverse for any reason or to remand for any reason, any block of the visitation of any gap in the visitation would be detrimental to the parents as well as the children. If they are in fact going to be in a position to have the children eventually returned, I think it would be to the benefit of both the children and the parents not to have a gap in the visitation.

I anticipate and have been told that there would be an objection to the stay. I am not sure what the objections are, so I would ask the court to allow me a short rebuttal to any arguments given in opposition.

THE COURT: Why don't we have the attorney general go next. Or would you prefer --

MR. GRODMAN: Either way, Your Honor.

Your Honor, on behalf of the

Department, we strongly oppose the motion regarding reinstating visitation. Of course, it's our understanding of the law that no adoption order can be finalized pending the appeal process. And we don't intend to commence those proceedings before the court until the appeal is resolved.

But regarding visitation, the Department of Social Services has opposed visitation since May of 1987. And their opposition to the visitation between these parents and these children is implicit in their filing of a permanent custody petition. If they felt it was in the best interest of the children to visit their parents, they would not have filed such a petition.

And we also believe that it is implicit in the court's findings that permanent custody be taken of these children, that visitation is not in their best interest. In order to make the findings that the court did, Your Honor had to find that the children came within Section 19a. of the Juvenile Code,

which it did. And then following that the court had to make a determination as to whether or not taking permanent custody would be in the children's best interest. And by the fact that the court took permanent custody, the court felt that was in the children's best interest.

Basically the Department opposes the visitations for two practical reasons: One of them is a matter of security. And I would ask that somehow the fact that there was a demonstration that took place after the court rendered its decision be placed on the record either by Your Honor, or I'd be happy to call Mr. Douglas to put that on the record, the reason being is that I expect when this case goes to the Court of Appeals that this issue of visitation pending the appeal is going to go to the Court of Appeals. And I think that the Court of Appeals ought to know that security is a real issue in this case, and --

MR. SCHWARTZ: I'd object to the

term "demonstration." I am not sure exactly what that means, number one. And number two, being displeased with the outcome and showing emotion has nothing to do with or should have nothing to do with any concerns of any security. I don't think that that's a matter of any record. That's something that is being given as opinion by counsel. That hasn't been, number one, substantiated. And even if it is substantiated, it isn't necessarily relevant to these proceedings, and I would object to that characterization.

I think the court has to make its determination based on the facts and circumstances as the court knows it and based on the record.

And I would save any other rebuttal for the appropriate time. I apologize to counsel for rising at this point, but I do think that particular comment or that particular shred of fact would be inappropriate for this hearing, and felt obligated to rise for that reason.

THE COURT: You want to respond?

MR. GRODMAN: I'd just like to acknowledge that I was not present at the hearing. I was in the hall, however, and I noticed that at least a dozen deputies were here to take care of a situation that took place. It took over a half hour, in my opinion, in the hallway to settle down the situation before the court could resume business. I admit that it's not a matter of record, and I'd be happy to call somebody to testify who was present, and I think Mr. Douglas would be an appropriate individual for that.

MR. SCHWARTZ: Except for the fact that counsel just admitted to now that he wasn't here, had no idea what it was about, and just raises that as a red herring to inflame the court, and I don't think it's appropriate.

THE COURT: Well, I think security is an issue in terms of being able to retain custody of these children. I think that

counsel is being honest in indicating that he wasn't here. He was able to observe what took place in the hallway, however. And I think he's trying to be very cautious in how he frames his argument. But I do think it's an issue that needs to be dealt with. And I think we need to move on, however.

MR. GRODMAN: Thank you, Your Honor.

Our other major reason for opposing visitation -- of the Department's, that is -- is that we believe that there has been ample testimony that contact between the parents and the children are detrimental to the children.

In particular, I would note that Karen Noel, Mohammed Ali's therapist, and Dr. Schornstein from the clinic, the psychiatrist from the clinic, testified at trial. My understanding is that their testimony addressed those matters. And I am also aware that there were other testimony at previous statutory hearings in which it was testified to that visitation between the parents and the children are detrimental to the children.

For those reasons, I would ask that the court deny the motion insofar as it requests visitation be reinstated.

Thank you.

MR. LADD: As to the efficacy of Mr. Schwartz' motion, I should note that Mr. Grodman is correct as to the fact that no adoption can be entered by this court until there is a final decision by the Court of Appeals affirming the order terminating parental rights.

And I draw the court's attention to MCLA 710.41 sub (2) sub (c). However, the court does have the power to enter any other order dealing with placement of the children pending a final decision by the Court of Appeals. A stay of proceedings here in that case would be of little significance, because the final decision of an adoption would wait the decision of the Court of Appeals.

Second of all is the issue of whether or not visitation is in the best interest of the children. I think Mr. Grodman

is correct as to the effect of the court's decision, that the court has found that continued contact between the children and the parents is not appropriate. Mr. Schwartz has offered nothing to rebut the findings of the court, nor has he offered any new evidence that would lead this court to believe that it would be appropriate at this time to continue further visitation.

And I think it is appropriate and important that the court consider the question of the safety and the wellbeing of children when making decision on continued visitation, first of all, because the court dealt to a great extent in this case with the issues of a need for permanency planning, a question of whether the children would be in a situation where they are confused about their situation and the effect of contacts that they had with their parents' contacts. And what Mr. Schwartz is asking is that be allowed to be continued. And the evidence here was that was not beneficial to these children.

Beyond that, there is this real security question in this case, and as to the protection of the children, the protection of all of the other parties involved. I was present at that hearing. I was personally threatened by one of the spectators here. And it's difficult for me to believe that under those circumstances that these children could be safe at any kind of visitation.

There's been a history here of questions of the appropriateness when the parents visited, where the parents visited. There was a situation where the parents and one of the foster parents arranged a visitation outside the supervision of the agencies involved here.

And again, there's no evidence and there is nothing to support a finding by this court that there is anything new that this kind of pattern of behavior by the parents would be changed. And in fact there would be no -- After this court's termination there would be no reason why the parents would abide

effectively by this court's order when they had not in the past. and because it's not in the best interest of the children, because there is no assurance that the children and even the workers can be protected under the circumstances here, and where there's no evidence that -- and no new evidence to support a finding by this court today that it's more appropriate to allow visits than it was three weeks ago, I would ask the court to deny any visitation with the children.

As to the general question of the stay of the adoption proceeding, I would merely ask the court to state that it's bound by MCLA 710.41 as to proceeding on final adoption, which the court cannot do until the Court of Appeals decides.

MR. SCHWARTZ: Your Honor, in response. First of all, no evidence or no requirement to show anything to rebut the proceeding is needed. The court has jurisdiction under MCR 7.208 Paragraph (E) and MCR 7.209 Paragraph (1) to stay the

proceedings and to retain jurisdiction and to stay those orders.

The whole point of the matter is -- and counsel admittedly -- and I am somewhat of a disadvantage because I did not try the case. However, this case is quite a notorious case, one that I have been following and have heard about and am aware of some of the proceedings.

I would indicate to the court that there was evidence -- At least it's my understanding that there was evidence to the contrary. That the children would be safe during visitation and that it was in their interest. With all due respect to the court, the court decided to rule in one manner in one respect. But the point is there is evidence on the record that has to be weighed now by the Court of Appeals in terms of whether or not the children would be safe and whether or not any dangers exist concerning any visitation or in fact return of the children. They try and make it sound like there was no

evidence whatsoever indicating contrary to the couple of people that testified that it wasn't in the best interest of the children.

In terms of security, unfortunately I think that this case is one that emotions become high in, and I don't think it's unusual before this court of any court in Juvenile Court to have people who are emotionally upset about a decision. However, my understanding of this, quote, unquote, "demonstration" was that one of the parties involved became physically ill because of the emotional outcome, and some of the people were upset. But that doesn't mean to say that these children were going to be snatched or anybody's life were going to be in danger or anything to that effect.

There was visitation throughout most of this case. There was no indication or no scintilla of any evidenced that these children were in any danger, that they were in any danger of being kidnapped or any other result that they may want you to believe. There's

nothing to support that.

Unfortunately there's been a ton of friction of not only between the workers and my clients, but between Mr. Ladd personally in this case. And I would hope that all parties concerned don't let their personal feelings towards each other get in the way of professionalism or the way they do a job.

It's my opinion, based on what I know about this case, that the Department and Mr. Ladd representing the children had no intention ever of letting these children come back, no matter what the circumstances were. And that may be one of the basis for the appeal.

Again, I haven't had an opportunity to read the transcripts and to see what the situation is. And I am trying my best to keep this on a non-personal level, hoping that the other parties would as well.

That point is that should the Court of Appeals be persuaded that this case should be either re-adjudicated or that the process

should continue in efforts to return these children at some point to their parents, it would be detrimental -- And I don't see how they can say that it would not be detrimental to the children to have a total break off in relationships with their parents on the possibility -- and there's always a possibility that the Court of Appeals will ask that this case should be reviewed or sent back for some reason.

I don't see the danger in allowing the visitation that was allowed all the way up until the point that the order was entered terminating their rights. I think that during that time -- And this is a custody case, so that I would hope, and usually it's the procedure, that the Court of Appeals tries to come down with an opinion in this case in a quick enough manner that any detriment to putting this off any further would be minimized. That I don't see the danger in allowing the visitation as it was at least before, pending the Court of Appeals decision.

I think that what we have here is emotional arguments being brought before the court as opposed to just a hard fact situation. There's no indication -- The parents live here. The father is employed. Their parents are here. There's no reason that they would leave. There's no reason for them to try and endanger these children to make this worse. Hoping that if the case does come back that they can move toward resolving this and getting their family back together.

And I would ask the court to consider it. It's not an unusual motion. It's not one that is asking for something that's never been done. And I would ask the court to consider reinstating the status quo as it was pending the decision of the appeal.

THE COURT: Without going into specifics of the case, the court will find that it is bound by MCLA 710.41 in terms of any imminent adoption proceeding, so that the parents can know that there will be no final adoption in this case until they have

exhausted their remedies.

In terms of visitation, this is another matter. When the Department files a petition for permanent custody, at that time all visitation rights are ceased, because it is often believed that everything that has been done to achieve return of the children to the parents have been exhausted. That I am approaching it from the Department's point of view. And at that point they're asking for termination, and that it would not be then to the children's benefit to continue to try to reunite the family. And in some instances it is to the detriment of the children.

It was very unusual in this case that the court allowed the visitation to continue. And in reflecting on the case, I guess I allowed it to continue for two reasons: First of all, I was hoping very, very much that the parents would get the message of what was expected of them and would comply and we would be successful in achieving reunification of this family.

Secondly, I did not ever anticipate that this case would take as long as it did to conclude. It took over, I think, a year to get all the testimony that was necessary to be able to come to some decision here. And frankly, that caused the court a lot of concern.

As has been indicated, this was a two-prong approach: One relates to the fitness of the parents, and the other relates to the best interest of the children. And when I got to the point of determining the parents were unfit, I guess I had a whole lot more trouble deciding whether after having allowed these children to maintain contact with their parents, what was I going to do to the children. Even though their parents were unfit, was I going to harm them more by terminating the rights of unfit parents or freeing them for permanency.

And I guess in analyzing the testimony that was presented, I ultimately came to the conclusion that while it might be

painful to the children to terminate that relationship initially, that it was far greater for the long run for their benefit, and that it was indeed to their best interest that the rights of their parents can be terminated so they can proceed to a permanent situation.

I think at this point to reconnect for any length of time in the future would be to their detriment, because it would just maintain that connection that the court feels is not an appropriate one.

I do believe that there is some security issues here. I don't believe these parents are going to necessarily snatch these kids and run out of state with them. But I do think in terms of visitation there's a lot of water that's gone under the bridge here. And I think that there has been some -- I would have some concern for the people, the Department, et cetera; therefore the court will deny your request for stay of proceedings.

MR. SCHWARTZ: Your Honor, I thank the court for its consideration.

Just for the purposes -- And I hate to belabor the court. But just for purposes of the record for the review, I would ask the court to indicate what the final -- the last statement the court indicated, which is in terms of the concerns of the security, I would ask the court to at least delineate for the record what the court is basing those concerns on.

THE COURT: The court is basing those concerns on the fact of what occurred here on the last day. And that there was quite a -- The parents showed up with a substantial number of individuals from the community. And there were threats that were made to various individuals. The fact that when the matter was pending the parents did take advantage and made arrangements with the foster mother to meet without permission or knowledge of the Department. And I think once you begin visitation it's a lot easier for the

parents to trace where children are. And I have a concern now that the parents realize what is happening here that they would be even more inclined then to do something that might be to their detriment as well as to the detriment of the children involved.

MR. SCHWARTZ: Thank you, Your Honor.

(Whereupon the above-entitled matter was concluded.)

APPENDIX E

STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF WAYNE

JUVENILE DIVISION

In The Matter of:
Juvenile Court No. 241,317

MOHAMMED ALI AMER,
SUEHIER A. AMER,

Minors

DEPENDENCY & NEGLECT

DISPOSITION

BEFORE THE HONORABLE MARTIN T. MAHER, Judge of Probate, Juvenile Division, Detroit, Michigan, December 15, 1986

APPEARANCES:

For the Department of Social Services: MS. CAROLYN BREEN
Assistant Prosecuting Attorney

For Respondent Parents: MR. LAWRENCE STRAUSS
Attorney at Law

MR. JOSEPH LANGO
Attorney at Law

For Minors: MS. K. LONERGAN
Juvenile
Defenders Office

Detroit, Michigan 48207

Monday, December 15, 1986 - at about 2:35 P.M.

(Court, counsel and all parties present)

THE COURT: Let the record reflect this is Wayne County Probate Court, Juvenile Division, case number 84-241,317.

Would the parties please identify themselves?

MS. BREEN: Your Honor, Carolyn Breen from the Wayne County Prosecutor's Office.

MR. STRAUSS: May it please the Court, Lawrence Strauss appearing for Mr. and Mrs. Amer.

MR. LONGO: Joseph Lango.

MS. LAWSON: Patricia Lawson, Department of Social Services, Protective

Services.

MS. LONGERGAN: Katherine Lonergan, substituting today for Bill Ladd, representing the children in this case.

THE COURT: Okay. The Court's had an opportunity to talk to the attorneys in chambers. Based on those conferences the attorneys have stipulated to and I believe they have talked to their clients.

What I'm going to do first of all is take care of the petition number 86-106,345 regarding the matter of the baby girl Amer.

It's my understanding, Mr. Strauss, that after talking with you and you talked to your clients that they will stipulate to the Court making this child a temporary court ward; is that correct?

MR. STRAUSS: Yes, Your Honor. My clients understand that's based upon the considerations that in my opinion would be the result if your Honor had to make a ruling. That you do have jurisdiction over this child. And, we're treating this matter as a family

consisting of three children. We would like all of the children returned to the parents as soon as possible, ideally.

However, we would like the Department to do whatever it could at this point in time to provide the maximum amount of visitation with the newborn child so that as long as we're all entertaining the idea of having this family reunited. We're concerned about possible damage being done to the newborn child by not being with its parents.

THE COURT: The Court will accept that stipulation also based on case law of In Re: La Flure and make -- What's the baby's name?

MS. BREEN: Your Honor, at this point we would ask the Court to amend the petition. The child's name is Z-I-N-Z-N-E.D

THE COURT: Is that Z as in zebra?

MS. BREEN: Yes, your Honor. It's Z as in zebra and then the B is B as in boy.

THE COURT: Is there a middle initial?

MS. BREEN: It's A, according to the parents.

THE COURT: The Court will change the petition from Baby Girl Amer to Zinabe A. Amer a temporary court ward.

The Court, after talking with the attorneys -- Well, just a couple of things. I'm going to give you a statutory rehearing date. That statutory rehearing date is going to be March 10, 1987, at 8:30 a.m. Normally, we would set a statutory rehearing date of sometime in July. But, I want to keep abreast of this case, probably more so than my other cases, to find out what's happening.

At a statutory rehearing what happens is the Court gets reports. Those workers, listen, because those reports are going to be filed two working days prior to the date of the hearing. And, normally, if I don't receive those reports at that time I assess those people responsible for filing those either $200 or $100, depending on how much attorney fees are involved.

The Court listens and looks to see what the parents have done to have the child or children reunited with them. That is, after they have worked with the worker. In this case, I would assume they're going to have counseling, parenting classes and those types of things. And, family therapy.

I'm also going to be looking at what the workers have done to try and reunite the family.

The Court's going to order that the parents give a list of relatives for potential placement. After the Department of Social Services has had an opportunity to investigate these relatives and are assured that they are convinced that would be a proper placement, at that time, talk with their attorney, Ms. Breen and she will contact the other attorneys for the child and for the parents. I believe there's going to be a stipulation at that time to have those people investigated or report from the psychiatrist.

The parents are also to provide

names and addresses of Lebanese, Arabic names for foster care licensing potential and for potential placement of the children.

The Court as well as the attorneys for the child and the State are very concerned with the young child; that there not be too much psychological damage done. The reason the Court is not returning to the parents at this time is because the deceased child was an abuse ward at a very young age with multiple broken bones in various stages. So, the Court is extremely concerned.

It's my ultimate objective to return the children to the parents as quickly as possible with the caveat that those children remain safe.

The children will remain in Foster Care. The family shall continue in family therapy and that Mohammed Ali also be involved in individual therapy.

Is there anything I forgot?

MS. BREEN: Your Honor, will reports from the parents' therapists be made available

to the Department of Social Services?

MR. LONGO: Certainly.

MS. BREEN: We would ask that be part of the order.

THE COURT: They're the ones that want the children back, so I'm going to be looking at how much cooperation they're giving.

MR. STRAUSS: We're going to give you everything we can to try to convince you and everyone concerned.

THE COURT: Mr. Strauss, is that correct?

MR. STRAUSS: Yes, Your Honor.

Lastly, if it please the Court, if the Court could give some consideration to placing Suehier and Mohammed Ali -- or the Department, to temporarily in a different foster home. We are concerned since at least at this point we all share the goal of reuniting this family. The fact that this is on information and believe that Mrs. Moore does not use the children's given Arabic

names. And, there are other matters as well where we feel that she is diametrically opposed through her actions and omissions, no matter how well-intentioned they might be, towards the stated goal of the Court reuniting this family.

THE COURT: Are the names Suehier and Mohammed? And, you're saying that the foster mother is not using those names?

MR. STRAUSS: Right. And, also I understand that when the children were placed in foster care they did not speak anything other than Arabic. Now, they are coming back allegedly saying things: "Mommy smacked baby" and things like that in English, which we feel they must be picking up from a source other than the parents. And, other things like that.

Now, Mohammed Ali, when there was at least some bond between the Amers and their son when they would visit, now Mr. Amer's son is telling him, "You're not my father" and things of this nature.

We feel that these things -- We don't think they're coming from anyone in the Department of Social Services. But, they must be coming from that foster home.

THE COURT: That can be handled in the therapy and the therapy that Mohammed Ali is going into.

MR. STRAUSS: We would like to have you order Mrs. Moore to refrain from such conduct, if in fact that is occurring. So that assuming what I'm saying has merit, that she does not create more problems in the interim.

MS. BREEN: For the record, your Honor, it has been the Department's case plan for a number of months that the foster mother does use the proper Arabic names. She is now using the proper Arabic names for the children.

The children when they initially came into care spoke no English. Over the course of months they have been learning the English language through the foster home.

The position of the Department is that the foster mother is not implanting any ideas in the minds of the children.

MR. STRAUSS: We understand that even in front of Dr. Derr that the foster mother was referring to Suehier as Lee.

THE COURT: Well, I'll order that the foster mother use the proper Arabic names for the children.

MS. BREEN: We have no problem

MR. STRAUSS: And, also not take them to church since they're not Christians.

THE COURT: I have no problem with that, but I think what's happening here is when were in chambers I said, "is that the extent?"

MR. STRAUSS: It really is. But, these are some concerns that I think I voiced in there.

I know that this isn't a hearing to attack the foster mother.

THE COURT: I'm ordering the Department of Social Services to investigate

possible Lebanese and Arabic homes; to look at the relatives of the parents. Hopefully, that will alleviate the problem. I don't think it's proper for Mrs. Moore to take the children to church other than a mosque.

MR. STRAUSS: Yes.

MS. BREEN: Your Honor, there has been a hearing before this Court on the issue of the mosque. The Court allowed it to continue as Mrs. Moore was following through. She does not take them to church, is the information that Judson Center workers understand.

THE COURT: I'm not going to require that she take them to a mosque.

MS. BREEN: She is not. According to the worker, she does not.

THE COURT: Mr. Strauss?

MR. STRAUSS: Mr. Amer is concerned about if there was any way to take the children to the mosque during the pendency of this litigation?

THE COURT: No. Not until at least

the statutory rehearing when I can have a better feel of how everything is going.

MR. STRAUSS: Thank you, sir.

THE COURT: All right. Is Mr. Longo going to be on this case or is he just here for today?

MR. STRAUSS: He'll be on this case throughout its duration along with myself.

THE COURT: Anybody dissatisfied with this opinion has 21 days to appeal. If they cannot afford an attorney, an attorney will be provided for them. If they cannot afford a transcript, a transcript will be provided for them.

We are adjourned.

(Whereupon, at 2:46 P.M. court was adjourned.

STATE OF MICHIGAN)
)
COUNTY OF WAYNE)

I, Grethel R. Brown, Certified Court Reporter of the Probate Court, Juvenile Division, State of Michigan, do hereby certify that the foregoing pages 1 through 8, inclusive, comprise a full, true, and correct transcript of the proceedings and testimony taken in the Matter Of: Suehier and Mohammed Ali Amer, Juvenile Court No. 241,317, on December 15, 1986.

GRETHEL R. BROWN,

C.S.R. 1127

Detroit, Michigan

February 20, 1987

APPENDIX F

STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF WAYNE - JUVENILE DIVISION

FILE # 84-241,317

ORDER

IN THE MATTER OF		BORN
AMER:	Mohammed Ali	12/11/82
:	Suehier Ahmed	11/18/83
:	Zinabe A.	12/9/86

From the findings and recommendations of the JUDGE MARTIN T. MAHER based on (hearing) on December 15, 1986, end due notice of the hearing of the matter having been given as directed by the Juvenile Code, respondent (having not) appeared on the said date in open Court, in person with parents with Atty. L. Strauss, Dss Worker, Judson Center Workers APA C. Breen and K. Lonergan (their) attorney.

IT IS THE FINDINGS of the Court that the acts complained of in the Petition(s) filed 12/5/85 alleging neglect and abuse on Mohammed and Suehier and 12/15/86 alleging neglect on

Zinabe (have) been sustained; and

IT IS FURTHER ORDERED THAT as to petition dated 12/15/86 regarding Zinabe, the parents stipulate to make the child a temporary court ward. Child found to come within Juvenile Code and placed in Foster Care under DSS supervision. As to petition of 12/5/85 children come within Juvenile Code, continued in temporary custody of the Court and remain in their present placement. The parents are to attend counselling and parenting classes. The parents are to give a list of relatives and/or arabic homes for investigation for juvenile placement. DSS and Foster Care homes are to use the children's arabic names. The family is to receive family therapy with Mohammed Ali receiving individual therapy. The statutory hearing and report date are set for 3/10/87 at 8:30 a.m. Reports due two days prior to Court hearing.

DATE 3/5/87

MARTIN T. MAHER
JUDGE OF PROBATE
JUVENILE DIVISION

APPENDIX G

STATE OF MICHIGAN

FOR THE PROBATE COURT, COUNTY OF WAYNE

JUVENILE DIVISION

In The Matter Of:
Juvenile Court No. 241,317

MOHAMMED ALI AMER,
SUHIER A. AMER,
ZINABE AMER,
Minors

_____/

VOLUME I

DEPENDENCY AND NEGLECT - ADJUDICATION

E X C E R P T

BEFORE THE HONORABLE MARTIN T. MAHER,
Judge of Probate, Juvenile Division,
Detroit, Michigan 48207

October 28, 1986

APPEARANCES:

MS. CAROLYN BREEN, Assistant Prosecuting Attorney

On behalf of the Department of Social Services

MR. WILLIAM LADD, Attorney-at-Law, Juvenile Defender's Office

On behalf of the Minors

MR. HAROLD GOLDBERG, Attorney-at-Law

On behalf of Mr. and Mrs. Ahmed Amer

Detroit, Michigan 48207

Tuesday, October 28, 1986 - at about 10:50 a.m.

(Court, counsel and all parties present)

E X C E R P T

THE COURT: The Court after listening to the testimony of the various parties first of all will take jurisdiction of both children. What I'll do is I'll go under MCLA 712A 2, 1 and 2d. It is the neglect statute; emotional wellbeing section of one. Under 2, the neglect. I'm also going to go under cruelty and I'm also going to go under depravity and also that the child was abused.

I'll use the definition of abuse that is found in Child's Protection Law. That means a harm or threatened harm to a child's health or welfare by a person

responsible for that child's health or welfare which occurred through a non-accidental physical or mental injury. The Court will rule that this was not an accident. The Court's going to address some of the arguments of the defense attorney, first. He says that the doctors weren't there. Well, very rarely in a situation where somebody causes the death of another person do you have doctors sitting around watching what's happening. All the doctors can do is look at the physical evidence and try to interpret those for the Court. It's true that there was nobody there except for the people and these would be the people that killed the child. There's not going to be an admission. At least, there has been no admission that they in fact did do that. The defense attorney said that the Koran is not that important. I did not know what the Koran was before but I heard testimony of the father and after listening to him and the mother I believe it's obvious that the Koran

is an extremely important part of their religious philosophy. And, the purpose of it is to protect their children from any harm. Here, you have a situation where if you were ever going to rely on that type of belief it would be the time when the child was injured. According to the parents' testimony they had approximately twenty minutes between the time of the alleged injury and the time that the EMS got there. I believe in that situation innocent people are in a state of helplessness and if they're extremely religious they rely on their religious faith. That's one of the things I would think that a religious person would do. Except, I don't like to get religious in to this philosophy. But, the parents brought it in so I'm just addressing the issue.

The parents say they took Mohammed to the hospital for his medical condition. The record and the testimony indicates that it was after three months of chronic diarrhea which the Court will not find to be what a

rational person would do when you're taking care of somebody's medical needs. The defense attorney says that the medical doctors did not testify that was the exact cause of death. There were other hypotheses. The only two hypotheses I heard was that there was another child and possibly another child pushed the deceased. It was the testimony of the parents that there were no other children around. The only other hypotheses that I heard was that the child would have to be running backwards on a watersoaked floor and slide into the wall, which is contrary to the testimony that the child was in the bathtub. So, neither one of these possible hypotheses would make any sense whatsoever.

Attorney Breen is correct when she says you have to look at the history in this case. Here, you have a case from day one or minute one where the parents for some reason that identify the child as a child that's different than the other children. As

opposed to him "jumping from the stomach", apparently it was a C-section. They interpreted it to be a negative factor, apparently. The child did have feeding problems.

The child eventually, on September 4th of 1984 became a court ward based on abuse of the fractures. The Court took temporary jurisdiction of Samier at that time and pursuant to the Court's philosophy made efforts to try to reunite the family. It took approximately a year and a half. The maternal grandmother assisted the Court in the gradual transfer of the child back into the parental home. It was less than a month and a half later that Samier met his demise.

You have to look at the testimony of the other witnesses and compare that with the testimony of the parents,. Here, you have emergency room doctor at Oakwood Hospital who says the ambulance driver and nurse were told of a drowning victim. And, that there was a diaper and the child's hair

was dry. That does not equal a drowning situation. I believe the testimony of the emergency room doctor. He has no reason I think to fabricate a story. He said that the hair was dry. One of the things that pops out to the Court, and sometimes things do and I don't know why. But, in emergency situations like that normally you would not put a diaper and then rubber panties on a child if in fact the injury did happen in the bathtub. The hair was dry and given the time that the doctor understood that the injury happened, coupled together with the EMS testimony that there would not have been sufficient amount of time for the hair to dry.

Then, you have the testimony from the Dearborn Fire Department. The run was that the baby stopped breathing. The call was 10:16 and that they arrived on the scene at 10:20. That's approximately four minutes later. The baby was in the mother's arm and the baby was not breathing. The baby had

plastic pants on. Again, the Court thinks that's important. It was over a diaper with a blanket. Now, the testimony of the mother was that the baby was wrapped in a towel, not a blanket. Again, that may go to the actual place of the injury. But, the child was not wet and the hair looked dry. Again, given that the mother screamed, yelled to the father, the father immediately called the EMS, there would not have been time to dry the baby's hair.

The driver of the EMS unit said that the mother told him the baby was lying in the water face up. The baby was playing with another child in the bathroom. The mother heard the phone ringing and that was the information he received from the mother.

Of course, the mother's testimony is different. She says she did not say that. She says he did not understand or he must be lying as far as what he said that she said. But, there were no other children in the tub.

The registered nurse at Oakwood

Hospital: The mother at that time said that the child and his sister and another child were in the tub. The water was filling in the tub when the phone rang. Mother went to get the phone. She heard a thud. Child fell on his back and water was below his ear level. The mother's testimony is that's not what she told the nurse at that time. I believe these last two witnesses would have absolutely no reason to fabricate their stories. The mother's testimony is different. That the other two children were not in the tub at the time.

The pathologist, certified medical expert in the field of forensic pathology said the child was about 33 inches and 25 pounds. The autopsy was performed on November 23rd, 1985. There was a fracture of the skull and cause of death was from head injuries. The fracture occurred by the head being hit by high velocity of speed, injuring the back of the head. When questioned if it was a slip in the bathtub that would give

this sufficient speed to this type of injury, he answered in the negative. If the parent dropped the child would that be sufficient? The doctor answered in the negative. In order for the type of injury, the extent of the injury that was caused to Samier he would have to fall from two or three stories. He said with that type of injury the child would have to be taken and swung to cause this type of injury. That's the speed and velocity that would be necessary to cause the type and extent of the fracture as he indicated. He said that the cause of the injury was one impact caused on a flat surface.

The director of pediatric intensive care at Children's Hospital noted also besides basically paralleling the testimony of the medical examiner that there was retinal hemorrhaging. He said that the history that's given by the parents does not cause the type of injury that we had in this situation. He said it's the type of injury that is indicative of severe force to the

head; direct impact similar to if the baby had fallen from two stories. He said that he had retinal hemorrhaging and a fracture. He said it was important because they could have happened at the same time or they could have happened at two different times.

We have the testimony of Ronald Bunse, Dearborn Police Department. He talked to the mother and the father. The mother he talked to at 1:20. The father he talked to at about 8:30 that evening. Mother said that she found the child in the tub with his face covered with water. Mother refutes that testimony and says it's not true. Again, the Court believes Officer Bunse. I can't think of any reason he would want to fabricate the story. He has no interest in the case. He's just doing his job. That the mother found the child in the tub with face covered with water. That the child said, "Oh wad" and pointed to the wall. The mother denies this testimony. Again, there's no reason for the police officer to make this up. When they

interviewed the father, the father's story pretty much paralleled the mother's, except there was no testimony regarding the wall. The officer also testified that the mother said that the child was submerged in the tub except for his eyes and mouth.

Patricia Lawson, petitioner for Protective Services said that the parents said that the child Samier was a difficult child with problems since birth. The child was made a court ward because of fractures when the child was four months old.

Testimony from Martha Stanislovaites, registered nurse from Botsford was that Mohammed Ali was in Botsford for feeding problems. There were two different charts. One said that the parents were feeding the child improperly and later the parents said they would follow instructions.

The parents' second witness, that would be Ms. Chahine was offered at Oakwood as an interpreter. It's important because

she was one of the respondents' witnesses. She said first of all the mother did not have any problem understanding English and neither did the father. And, they could both communicate well. The Court in observing the demeanor and the responses to the questions would also indicate that there's no problem in understanding or communicating English. But, the mother at that time said that the water was running in the tub and that the children -- the two boys for sure were in the tub when the water was running and the phone range. That's consistent with the testimony that's given by the earlier witnesses put on by the State and inconsistent with the testimony as given by the mother.

There's inconsistencies and differences in testimony as far as who was the caretaker of the children. But, on a whole, their stories pretty much paralleled each other. The Court had an opportunity to observe the witnesses, observe the demeanor and tried to pick up any subtleties that I

think are important to myself. One of the things that I found important was the father when he was testifying. His emotions pretty much fit what I would consider appropriate during the time of his testimony that would parallel injuries of the child. The mother, while she was giving testimony up until she started to actually give testimony of how the injury occurred or the telephone conversation, I thought her emotions were somewhat forced. When she gave testimony of how the injuries occurred I did not think her emotions were consistent with what had transpired at the time. Later on when she testified as to when Samier died her emotions -- again, I'm talking about basically her tears were appropriate and her demeanor also changed. That when you get to the critical area of what happened then testimony is relied on by rote. We heard her orchestrate what would sound best to the Court, as opposed to what really happened.

Mr. Ladd is correct. We don't know

who did it. It was either the mother of the father. I have no doubt in my mind it was one of the two that did it. But, based on the child's history with the court, the other parent should have been in a situation to protect that child from the injuries from the parent that caused the death of the child.

The Court will further point out two other things that I think are important. First is that this mysterious phantom phone caller never called back. If I called somebody either on a business line or on a personal matter and the person lifted up the phone, said, "hello and then screamed I would have done one of two things. I would have called back to identify myself and ask what's happened. Or, if it was a business phone call I would have done the same thing. I would have been concerned. I think an average person, not merely family or business would have called back. So, as far as the parents having no testimony or nobody to offer as to who was the phantom phone caller,

I think is consistent with the story not being factual.

The mother testified that there was a sliding door on the bathtub and that sliding door would have tracks. If a child was standing in the bathtub that would not be a slippery bathtub because of these tracks which would take away from the story of the child slipping. If the child was in the bathtub and slipped, that would be inconsistent because the mother's testimony was that there was a bathmat in the tub to prevent a slipping situation.

So, if you take all of the testimony put together and you just use common sense this is a situation where one of these two people is responsible for not protecting that child. Under the cases as cited by the Prosecutor the case cited by Attorney Ladd, the Court will make the other two children wards of the court. The Court believes that these children definitely need protection from both of these parents. These

cases are In Re: La Flure, In Re: Ditrich and In Re: Futch.

Anybody dissatisfied with this opinion has 21 days to appeal. If they cannot afford an attorney, an attorney will be provided for them. If they cannot afford a transcript, it will be provided for them.

I am making both of these children wards, temporary wards of the court at this time.

Where are the children at?

MS. BREEN: In foster care, Your Honor.

THE COURT: The children will remain in foster care until disposition. We'll set a disposition date.

I know Mr. Goldberg was not present yesterday and I'll assess one hundred dollars.

If you're dissatisfied with that opinion you also have 21 days to appeal. That hundred dollars should be paid within 10 days.

MR. GOLDBERG: Your Honor, I never had an opportunity to address that. Can I do that now?

THE COURT: No, set it up. I'll let you address it at another time.

The earliest I can put this in for disposition would have to be the 18th of December. Be here at 8:30.

MR. GOLDBERG: Your Honor, I have another trial on that date. Is Wednesday, the 17th possible?

THE COURT: No, but how about the 19th? Where's your trial at?

MR. GOLDBERG: In Highland Park.

THE COURT: Off the record.

(Whereupon, discussion was held off the record.)

THE COURT: I could fit you in at 1:30 on the 15th. I would ask the worker to make some type of recommendation in writing and present that at least two or three days before so that the other attorneys can have an opportunity to look it over and see if

they're going to have something to counter indicate that.

What I'll do is I'll set it for 1:30 on the 15th. I'm only going to be able to give you about an hour. I have a jury trial that afternoon.

MR. GOLDBERG: That'll be fine.

MS. BREEN: Your Honor, on behalf of the petitioner we would ask at this time for an updated clinic referral. We believe it would be very appropriate in this case to determine where placement should be for these children.

THE COURT: I'll order a Clinic. If it's contested we'll set another date.

MS. BREEN: Thank you, Your Honor.

(Whereupon, at 11:10 a.m. court was adjourned.)

STATE OF MICHIGAN)
)
COUNTY OF WAYNE)

I certify that this "EXCERPT OF THE PROCEEDINGS", consisting of 13 pages, is a complete, true, and correct transcript of the proceedings taken in this case on October 28, 1986.

_____

Date GRETHEL R. BROWN
CSR1127

APPENDIX H

STATE OF MICHIGAN
IN PROBATE COURT FOR
THE COUNTY OF WAYNE
JUVENILE DIVISION

REPORT AND RECOMMENDATION
OF REFEREE

In the Matter of AMER: Samier No. 241,317

A child(ren) alleged to come within the Provisions of Act 54, Extra Session of 1944 as amended

I, the undersigned, a duly appointed Probation Officer of this Court, acting as referee in accordance with the Provisions of Act 54, Extra Session of 1944 as amended, of the State of Michigan, hereby certify and

report that I have this day taken the testimony of the witnesses and statements of the parties in interest in the above matter, and no objection was made by the parties in interest to the taking of such testimony and statements; that the testimony and statements so taken show that: Child(ren) is(are) under the age of nineteen years;

Samier, born 11/18/83

The matter is before the Court today, September 4, 1984, for continued adjudication on a Petition filed April 2, 1984, by Steven Rose of the Wayne County Department of Social Services.

Present in Court today are: Prosecutor Pat Battersby, for the Department; Steven Rose, petitioner: Cynthia Falkenstein for the baby; retained attorney, Gary Eisenberg, for the mother and father, Rehab and Ahmed Amer. Both parents are present, as well as Ellen Rumman, Tula Michalakis and Mary Lane, all three of the International Institute and

Betty Glover of the Court's Family Treatment Unit.

The Court conducted Pre-trial April 16, 1984. The matter was continued at the request of counsel for further Pre-trial May 10, 1984. On May 10, 1984, the Court received four exhibits that were joint exhibits of the Department, child and parents, being Exhibit #1, a letter from Dr. Sheldon A. Schore, D.O. to Gary Eisenberg, dated April 4, 1984, Exhibit #2, the medical records of Samier Amer from Dr. Sheldon Schore, Exhibit #3, an Affidavit signed by Wafaa Bazzi, May 7, 1984, and Exhibit #4, being the medical records of Samier Amer from Oakwood Hospital dated April 24, 1984.

The Court took sworn testimony June 12th from Paula Fisher, Public Health Nurse; partial testimony from petitioner, Stevevn Rose, from Dr. Carolyn Johnson and from Dr. Sheldon Schore. The Court heard sworn testimony July

31st from Dr. David Osher and from Dr. A. Suarez and completed testimony from Steven Rose. The Court also received with limitation, the medical x-rays of the child, Samier. The Court heard partial sworn testimony from the mother, Rehab Amer. The Court, today, heard sworn testimony from the mother and from Ellen Rumman. The Court also heard dispositional testimony from Dr. Ruth Day of the Clinic for Child Study.

Based on the testimony in the record as a whole, the Court makes the following findings of fact for purposes of adjudication and partial disposition:

FINDINGS OF FACT

(1). Samier Amer was born November 18, 1983, at Oakwood Hospital. He is a resident of Wayne County, residing with his parents, Ahmed and Rehab Amer, at the time of Court intervention.

(2). He has a twin sister, Suehier. He has an older brother, Mohommad Amer, born 12/11/82.

(3). The child was detained at Oakwood Hospital as a result of a 3200 filed by hospital personnel, involving bites, as well as numerous fractures.

(4). Based on the testimony of Paula Fisher, Public Health Nurse, the Court concludes the child was difficult to handle with the family switching formulas. The child stiffened and screamed when changed by mother.

(5). Based on the testimony of Steven Rose, the Court concludes that the Department became involved as a result of a referral from Oakwood Hospital. The child had bite marks on the left side of his torso, the back of his neck and the bottom of his feet. The Department of

Social Services filed a Petition due to the unexplained fractures and bites. The Department never did investigate the identified babysitter of Wafaa Bazzi nor the father alone, nor others in potential contact with the child in the care of the relatives, Mr. and Mrs. Ayache, also of Dearborn. Department investigation shows the family to be residing in a fine, clean, suitable home and shows the family to be close knit, with bonding and no evidence of marital discord.

(6). Based on the testimony of Dr. Carolyn Johnson, who is qualified as an expert in Pediatrics by her educational experience, the Court finds that Samier is a much different child than his siblings. The doctor initially assumed the child had a milk allergy and, therefore, changed the child's formulas. The doctor did arrange for the child to be admitted to Oakwood as a result of the mother's continued complaints

regarding the child's feeding problems. The doctor observed that the child had a fracture in the left femur, the left tibia and the right humerus. The doctor conducted a number of tests to rule out bone problems. There is no medical reason for the child to have a large number of fractures. The doctor found the child to be a very stiff baby who is hard to manipulate. This trait is called being hypotonic. A normal baby is more floppy, like jello.

The doctor, based on her observations and testing concluded that there was needed a substantial height or quire an acceleration motion in order to break the bone as the child is a very small mass. The doctor, based on her experience, found that a child of his age would scream when touched as a result of these injuries and

there would be swelling for several days that would be observable to others about the child. The doctor found the child to be very attentive to his mother and the child definitely preferred his mother to any other person.

(7). Based on the testimony of Dr. Sheldon Schore, who was qualified as a result of his practice as a D.O. since 1966, the Court finds that the family had regular contact with Dr. Schore from December 5, 1983, through February 1984. The child was brought in for treatment on a regular basis. The family did bring the child to his attention January 20, 1984, when the child's right arm was limp. Dr. Schore referred the child to an orthopedic specialist, Dr. Mandell. The doctor did not file a 3200. The doctor noted the child did have continuing feeding problems and the mother

preferred finally to go back to a specialist and to have her child at Oakwood Hospital.

(8). Dr. A. Suarez, per stipulation of counsel, qualified as a Board certified Orthopedic surgeon. The doctor observed the child, Samier, in the hospital, as well as reviewed the March 13th x-rays. The doctor based on his expertise found five areas of fractures, being the right humerus which is the upper right arm; the left upper tibia, which is the area between the knee and the ankle, the distal and middle left femur which is the area between the head and the knee and the left clavicle which is the collarbone. The doctor, based on his experience, concluded it to be likely child abuse. The doctor, based on his physical and his review of x-rays, found that fractures, when fresh, result in pain and swelling and then go into a

lumpy stage. The left clavicle injury was at the lumpy stage when the child was at the hospital. The doctor, based on his experience, found the left clavicle probably to be the oldest fracture more than one to two weeks of age. The child had no pain in any other part for previous fractures were evidenced. Based on the doctor's expert testimony, the Court concluded that the child or anyone close to the child would or should notice the injury to the child. The doctor would place, at the outside, the injuries at the age of 3 weeks, at most, more likely 1-2 weeks old.

(9). Based on the testimony of Dr. David Osher who was qualified as an expert radiologist by counsel and who took the x-rays of the child and who wrote a report for the medical records March 14, 1984, the Court concludes that there was

extensive periosteal new bone formation. The observations of the new bone formation in conjunction with the observation of the healing fractures leads the Court to find that these fractures did occur and are of differing ages.

(10). Based on the testimony of Conna Sabo who is qualified as an expert medical social worker based on her education and 10 years experience, the Court finds that the hospital filed one 3200 initially on the observation of the bites on the child's body and then a second 3200 as a result of the discovery of the fractures. Ms. Sabo confirmed the mother continues to be concerned over her child from birth and that she claimed the child jumped out of her during the C-section. Ms. Sabo never interviewed the father

regarding any explanation. Ms. Sabo acknowledged that the mother is very concerned for her baby. Through the efforts of Ms. Sabo, the siblings were examined and they had no signs of physical abuse. All three children were up-to-date on their shots and physicals. The mother did not, initially provide the name of the babysitter to the hospital as she had sworn on the Koran not to reveal the name of the babysitter. The mother subsequently revealed the babysitter's name.

(11). The mother, Rehab Amer, testified that her child, Samier, was always different. That he jumped from her stomach and screamed on the second day. The mother wondered why the child cried all the time. The mother took her children to Dr.

Schore and to other persons. She even had to force feed her baby with a dropper in order to get him to eat. The mother tried various kinds of formulas and feedings and finally resorted to asking that child be put into the hospital. The mother is willing to work, and has been willing to work with Ms. Rumman of the International Institute.

The mother was responsible for sole care of the child. She did not have her husband watch the baby alone. The mother knows about the fractures, but has no explanation for the fractures. The mother's position is that she loves her baby and why would she keep talking to a doctor if she had harmed her child.

(12). Ellen Rumman, a licensed master

social worker with the International Institute specializes in providing counselling in the Arab community. Ms. Rumman has visited the mother and baby and relatives in the family home. She found there to be good respect between the mother and father with a strong family network. She notes that Mrs. Amer wishes to follow her own mother's footsteps as a good mother. Mrs. Amer's mother raised 14 children. Mrs. Rumman saw a warm relationship between the mother and the child, Samier. The mother also responded appropriately to her other children. Mrs. Rumman acknowledged that discipline is part of the cultural background and that hitting is a sign of caring within the Amers ethnic group.

(13). Dr. Ruth Day was qualified as an

expert in psychiatry based on her education and experience and she saw the family on two occasions. Dr. Day's evaluation was somewhat limited due to the fact that not all family members are fluent in English. Mr. Amer provided some translation for the aunt, who is the child's caretaker. Dr. Day acknowledged that there was something wrong with the child, Samier, which would have been caught by the various doctors who viewed the child. Dr. Day found the mother to be carrying the very heavy burden raising three children under the age of one year, having sole responsibility and having no relief with any babysitters. The child was comfortable in the care and custody of his father. The child, Mohammed, is an independent child and has no unusual signs in

his behavior. Dr. Day believes it is necessary to have an interpreter to assist the family in preparing a final treatment plan. Dr. Day concludes that the mother, more likely, had a particular fixation on this particular child and the doctor acknowledged that the mother was substantially overworked. Dr. Day recommends against return of the child at this time, to the care of the parents.

CONCLUSIONS OF LAW

(1). The Court has jurisdiction over the subject matter and the parties.

(2). The allegations made in the Petition filed April 2, 1984, pursuant to MCL 712A.2(b) have been substantiated, and the parents wish an adjournment to present further dispositional testimony.

THEREFORE, IT IS RECOMMENDED THAT Samier Amer be made a temporary Court ward, continued in the care of his aunt, Mrs. Ayach under the temporary placement Order of shelter care or suitable relative placement under the Family Treatment Unit supervision, with the case continued to October 31, 1984, at 9:00 a.m., at the parents' request for further dispositional testimony.

APPENDIX I

Michigan Supreme Court

Lansing, Michigan

ORDER

Dorothy Comstock Riley
Entered: July 31, 1990
Chief Justice

89463 & (93)

In the Matter of MOHAMMED ALI AMER, SUEHIER AHMED AMER and ZINABE AHMED AMER, Minors

---

DEPARTMENT OF SOCIAL SERVICES,

Petitioner-Appellee,

v

SC: 89463
COA: 114910
LC: 241-317

REHAB AMER and AHMED AMER,

Respondents-Appellants.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion for stay is DENIED as moot.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

July 31, 1990
Deputy Clerk

APPENDIX J

Michigan Supreme Court

Lansing, Michigan

ORDER

Dorothy Comstock Riley
Entered: September 28, 1990
Chief Justice

89463(99)

In the Matter of MOHAMMED ALI AMER, SUEHIER AHMED AMER and ZINABE AHMED AMER, Minors

---

DEPARTMENT OF SOCIAL SERVICES,

Petitioner-Appellee,

v

SC: 89463
COA: 114910
LC: 241-317

REHAB AMER and AHMED AMER,

Respondents-Appellants.

On order of the Court, the motion for reconsideration of this Court's order of July 31, 1990 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

September 28, 1990

Clerk

APPENDIX K

The Children's Home Of

JUDSON CENTER

NATURAL PARENT/AGENCY AGREEMENT

Child's Name: _____ Date of Placement _____
Parents:

_____

_____

_____

I,

_____

do agree for my child

_____

to be placed in Foster Care through Judson Center. I do further agree to:

1. Be an active member of the treatment team by attending quarterly case conferences and assisting in treatment planning.

2. Be supportive of the foster parents and caseworkers in their efforts to work with my child.

3. Work with the caseworker on establishing goals for our family and working hard to achieve these goals, so that a more

permanent placement for our child will be possible.

4. Arrange for visits with our child with the caseworkers and follow through with these visits as planned.

5. Be supportive of our child while he/she is in placement by maintaining contact and interest in his/her life.

6. To obtain counseling regarding parenting skills and grief therapy.

7. To provide Judson Center documentation of progress in said counseling on a bi-monthly basis if receiving services from an agency other than Judson Center.

_____ _____

Parent Date

_____ _____

Parent Date

_____ _____

Agency Foster Care Caseworker Date

APPENDIX L

The Children's Home Of
JUDSON CENTER

NATURAL PARENT/AGENCY AGREEMENT

Child's Name: _____ Date of Placement _____

Parents:

_____

_____

We,

_____,

have stated an interest in regaining care and custody of our children,

_____,

and in order to work toward that goal we agree to the following activities:

1. Attend quarterly case conferences to plan goals, help assess progress and exchange information.

2. Visit on a weekly, supervised basis with our children.

3. Meet with the caseworker on a weekly basis during supervised visits.

4. To continue to attend counseling to resolve grief and other feelings surround the death of our son, Samier and regarding appropriate parenting skills.

5. To attend counseling to acknowledge and accept responsibility for the severe abuse inflicted on Samier Amer, now deceased.

6. To provide Judson Center releases and documentation of purpose progress and attendance at said counseling on a completed, bi-monthly basis if receiving services from an agency other than Judson Center.

We understand that the goals we set and the progress we make will be used in reports to the Court. We are also aware that complete fulfillment of this agreement does not guarantee (immediate) return of our children, but will be an important factor in the Judson Center recommendation to the Court. We also understand that failure to meet the terms of this agreement may result in a petition to the Court requesting termination of parental rights to our children.

The Judson Center worker, acting on behalf of the Department of Social Services, agrees to assist the client in his/her efforts to regain custody of his/her children and in order to work toward that goal agree to the following:

1. Notify the parent(s) regarding quarterly case conferences.

2. Arrange visits on a weekly supervised

visits between the children and parents.

3. Meet with the parents on a weekly basis during supervised visits with their children.

4. To receive and review by-monthly counseling reports from the agency/agencies where the parents are involved in therapy.

5. This caseworker will supervise weekly visits between the parents and the children and if necessary will engage in limit setting with regard to parental concerns/issues.

The above agreement is to insure the proper care for the children and planning for the children and family.

It is agreed that this agreement will remain in effect until jointly amended or if new

circumstances and/or information warrants. It will be reviewed at least quarterly to determine progress toward meeting the above goals.

Parent	Date
Parent	Date
Agency Foster Care Caseworker	Date

Appendix M

At the preliminary examination of a criminal proceeding against Mrs. Amer before Judge Joseph Burtell, Dr. Suwait, who performed the autopsy on the body of Samier was questioned on direct examination as to his observations. As for external trauma he answered that there was a small bruise on the left side of the cheek. As for internal trauma he testified:

> When I did examine the head, I found that, you know, there was a bruise on the back of the head, about this area (pointing

to the back of his head) that was not seen externally.

(THE COURT): It was not seen externally?

(THE WITNESS): That's correct. When you open up the scalp, you know, there's a big bruise there and underneath the bruise there was a fracture of the skull . . . ."

The witness continued:

Yes. And when I examined the brain, I found that the brain, underneath that, is bruised, contused, and also there was a contusion of the brain on the front half, and there is a little bit bleeding inside the head on the front part of the head, and that were all the injury I have seen in this particular case. (T 2/7/86, p. 15-16)and see(a-5)

Counsel has obtained the transcript of the evidence at the criminal trial of Mrs. Rehab Amer, found innocent of killing Samier. As a matter of public record this Court should consider taking judicial notice of it.

It is summarized below and the transcript is submitted herewith.

The first portion of the trial was held on August 7, 1986.

James A. Caputo was a firefighter for the City of Dearborn and drove an ambulance to the Amer home on the day Ssamaier died. He testified that Mrs. Amer never indicated that she thought the child had drowned or feared that he had drowned. (T.15) The fire officer however reported a possible drowning because the mother had indicated that she found Samier face up in the bathtub. He characterized his hypothesis as an "assumption". (T.18)

The next witness was a Bruce Darr who was a corporal with Dearborn Police Department. (T.20) He testified that he questioned Mrs. Amer who said that the children were in the bathtub, the phone rang, she answered it, heard a loud thump, ran back to the bathtub and found Samier lying face up in about four inches of water. (T.23-24) Darr also testified that Mrs. Amer said that she gave Samier CPR, that he started

breathing again, she dried him off and dressed him and asked her husband to call the fire department.(T.26) She apparently notified several other family members who came over to the Amer home. (T.27)

In response to Officer Darr's questions Mrs. Amer denied being responsible for the injuries to the child. (T.32) The two doctors with whom Officer Darr spoke with were Dr. Webley and Dr.Derum. (T.35)

Officer Darr indicated that at the time he had some doubt about the truth of what the Amer's were telling him. (T.39) Officer Darr made no follow-up investigation into the circumstances surrounding the Amer household at the time of the death of Samier.(T.41) And did not scrutinize the condition of the bathroom or the bathtub. (T.41) In fact he did nothing to investigate the condition of the house. (T.41.42)

The trial continued on August 11th, 1986 with the testimony of Dr. Ashok Sarmaik. Dr. Sarmaik was the Director of Intensive

Care at Children's Hospital and had been licensed to practice medicine and had gone to medical school in Bombay, India. (T.3-4) He was not a specialist in pathology. (T.5) He was not an expert in determining causes of death by unnatural means. (T.5-6)

The Doctor testified that Samier arrived at Children's Hospital on November 21st, 1985 at about 11:00 o'clock in the morning.T.6-7). A discussion ensued about the qualifications of this doctor to testify as to a possible cause and finally the court indicated that he could be an expert in a "hypothetical". (T.13) He testified that he had seen head injuries of this type of children falling from second story windows.(T.15);that the type of injury that he observed in Samier was not consistent with the child falling in a bathtub.(T.16) (It should be noted he did not testify that the type of injury could not occur as a result of falling in a bathtub under circumstances where the child had a history of unexplained fractures and possibly

of bone disease. Nor did he explain how it was that the other indicia of an impact which would be analogous to falling from a second story window were not present in this instance.)

This doctor had not done an autopsy. (T.17) and had obtained a history of this incident from a medical resident whose name was Ellen Christy.(T.18) Of course the doctor could not speculate as to who would have been responsible for the injury to Samier. (T.22) The essence of the doctor's testimony was that this injury was not consistent with the fall in the bathtub in the usual case. Nor could he testify whether the injury was caused by a person out of an angry, upset or raging reaction or whether it was a cool intended action. (T.24)

Putting aside the history as reported to the doctor by others he could not rule out a severe accident as being the cause of the injury. (T.25).

Question: OK,
finally Doctor, just once

again to clarify a point: you can only rule out when Mr. Wright asked you about an accident causing these injuries, an every day type of child accident, however you cannot rule out a severe accident as being the cause in this particular case. Is that correct?

Answer: Without a history, I cannot." Page 32.

The next witness was Dr. James Webley. Dr. Webley was the emergency room physician at Oakwood Hospital and was on duty November 21st, 1985. He was a certified emergency physician without any other specialty. It was unclear to the doctor what had happened and so he asked the nurse to get the history. (T.40) The child was not bleeding from anywhere. No bleeding at the back of the head and nothing but a bruise on the left cheek which was not very well developed.(T.42) The doctor testified that the story did not make sense to him.(T.42) This doctor thought that the history was of a

drowning but he did not indicate where he obtained that information. (T.54) The doctor never talked directly to the parents.(T.46) He could not determine the time when the child's difficulties began. (T.48) but he did say that the difficulty could have been as much as 3 hours prior to him seeing the child. Dr. Webley filed a child abuse report but he testified that he would file such a report even with the slightest suspicion that child abuse had occurred.(T.52-53)

The next witness was Dr. Linda Derhum. She was the house physician at Oakwood Hospital. She testified that looking through the hair, down by the scalp, it was a bit damp.(T.55) The witness had no question but that the child's hair was damp. (T.57) She testified that she told the police officers this.((T.58)

Paul Monberg was a firefighter for the city of Dearborn. He responded to the emergency call of the baby not

breathing.(T.64) He entered the Amer house at about 10:20 a.m. on November 21st, 1985. When he arrived at the house the child was in the mother's arms. (T.65.66) He testified that the child was dry; (T.67) and that the child was not bleeding from anyplace and not from the back of the head.(T.68) He did not himself go into the bathroom to see what the bathroom was like. He assumed it was a drowning.(T.70) When Monberg arrived at the Amer house there were many people there, at least 6.(T.71-72) He could not say whether the baby had been in water or not.(T. 72) He didn't run his fingers through the baby's hair and really wasn't paying attention to whether the baby was wet or dry.(T.73) When asked whether his partner had said that the mother or the father had indicated that the child had drowned the answer was "I assumed that". T.76)

Ahmed Amer, the husband of the defendant Rehab Amer was called as a witness by the state. He testified he worked at Ford Motor

Company and did work on November 20, 1985. (T.80), and that he went to sleep at his usual time, about 3:00 o'clock in the morning after coming home from work. He looked in at his children and they were fine.

He awoke at about 8:30 or nine o'clock the next morning. The phone had rung and Mrs. Amer went to pick it up so as not to wake him.(T.87) He testified that a rule in the home was that his wife would make every effort to make sure the phone doesn't ring in the morning when he was sleeping. (T.109-110) That would be on November 21st. He awoke to his wife's scream. (T.82) He testified that he saw his wife trying to revive Samier who had no clothes on.(T.84) The other children were half way dressed in diapers and towel.(T.84-85) They both tried to give the child mouth to mouth resuscitation.

He testified that he had no difficulty with Samier except that Samier was sick all the time, (T.89) and that the sickness caused him to take the child to seek medical

attention; (T.91) that Samier was sick all the time in contrast to the other children, such as difficulty in feeding (T.101) but that this posed no difficulty for his wife or himself in the interaction of themselves with the child. (T.102) He testified that his wife was generally a soft spoken person(T.106) and that she had never told him that she hurt or assaulted the child. (T.116)

The next witness was Dr. Sawait Kanluen. Dr. Kanluen testified that he was employed at the Wayne County Medical Examiner as an assistant medical examiner for Wayne County and he was a board certified in pathology as well as anatomy and forensic pathology.(T.118) He was a graduate of the medical school in Bangkok, Thailand, in 1966 and testified in court once or twice every week.(T.120) As to the autopsy of Samier:

> "When I examined the head I found that there was a bruise or contusion on the back of his head and the skull underneath was broken, a so called a stellate (sic) fracture.

That means that there is a center area around the fracture radiated from that point, a stellate fracture."

"Question: Let me stop you right there. You indicated that there was a bruise on the back of the head.

Answer: Yes.

Question: Was that visible by looking externally at the scalp?

Answer: No.

Question: How did you determine that there was a bruise on the back of the head?

Answer: Because we cut the skull open, make an incision and we take the skull back and that when you know, I begin to see that bruise.

Question: So there was a bruise on the inside of the skull?

Answer: That's right. He also, after opening the skull, examined the brain."

"And the brain was contused or bruised, there was bruise in the front part of the brain. And there was also

hemorrhaging in the brain." (T.122-123)

So far as any other observations, Mr. Kuwait said:

> "Except the injury to the head, I did not see any other thing unusual." Page 124.
>
> "Question: So there was no other injuries to this child other than the injury to the head, this bruising on the inside of the scalp, the stellate fracture to the back of the head and the bruising in the front of the brain?"
>
> Answer: Right." (T.124)

He answered in response to the question as to the cause of death as follows:

> "The cause of death was due to his injuries." (T.124)

And he said in response to the question as to what caused the injury:

> "The extent of the injury and the pattern of injury, both on the skull and the bruise in the brain, indicated that, you know, the injury happened when the head was moving at a great speed and velocity. And it hit a big object." (T.124)

He testified that it would have been a blunt object.(T.125)

> "Question: So basically you are saying that this blunt object when the head was moving at a great rate of speed hit a fixed object like a wall?
>
> Answer: Like a wall, like a floor or any flat surface space. But the object is stationery and the head was moving." (T.125)

He testified that it was possible that someone swung the child and the head hit the wall. (T.125) The witness testified that he classified this as a homicide. (T.127) He said he reached his conclusion because this could not happen from an ordinary fall in the bathtub.

> "If it is due to a fall, it has to be a fall from a great height like 2, 3, 4 stories and fell--the back of the head down." (T,128)
>
> "If that would happen, then--you know--the child would have some outer injuries, too." Page 128.

(There were none, however and the logical conclusion can only be that such force did not cause the injury to Samier.) A complete account of the medical examiner's report is contained on Page 124 through 129 of the transcript.

The doctor testified on cross examination that he could not tell that the child's skull was fractured until the skull was opened up.(T.133) Dr. Kuwait testified that the child's head moved at a great rate of speed and hit a fixed object. But he also then testified on cross examination that it could have been a wall it could have been the floor it could have been anything and it could have been the top of the bathtub.(T.134); or the sink or the tile floor. The doctor testified that he couldn't tell how far the child's head was from the object that it hit;(T.136) couldn't tell if the child was ten feet from an object which the child hit or two feet.(T.136) but that a

great rate of speed was necessary to cause this type of injury. (T.137) that in order to swing the child's head so that its head would hit a fixed object the person swinging the child would have to have an extreme amount of strength.(T.137) Dr. Kuwait did not rule out the possibility that the injury could have been caused by the child himself flipping over in the bathroom.(T.141) In the event that the child ran at full speed that he could not rule out the possibility that the child slipped and fell backwards in the bathroom.(T.145-146)

> "Question: OK. And if the child was running at a great rate of speed, falls back and hits his head and rolls or slips into the tub would that be consistent where that eye bruise came from-- that face bruise came from? That's a possibility as well?
>
> Answer: Well, anything is possible.
>
> Question: All right, that is exactly my point."

"Question: You cannot rule out that the child was thrown from a foot of five feet four inches to six feet in height by someone slipping and projecting them toward either a bathtub or tile or wall: you can't rule that out either, can you?

Answer: I cannot rule it out, and like I said--" (T.149-150)

Officer Bunce was a Detective Sergeant with the Dearborn Police . (T.163) He found nothing unusual about the bathroom or bathtub.(T.163)There is no testimony in the record that any other police officer ever did any further investigative work in the bathroom or in the Amer home to determine if there was any evidence of blood or marks or any indication of foul play. This in itself would lead to the inference that there were no such evidence.

He testified that Mrs. Amer said that she thought the baby had struck the wall. (T.168) The detective's report apparently did not indicate that Mrs. Amer ever said to

him that the baby might have drowned. (T.172) She did indicate that he might have slipped and hit the wall. (T.169) He indicated the sentence given by Mr. and Mrs. Amer are essentially the same. (T.174) Apparently the detective had no suspicion about the versions that the Amers had given him, but it was his job to be suspicious and he relied on the doctor's report that he didn't feel that the injuries were consistent with what he had heard so he went back to check the bathroom and so forth and he found nothing. (T.176)

So much for the evidence at the criminal trial.

Appendix N

Litigation Chronology

03/24/84	Samier Amer made temporary ward of the Court.
11/24/85	Suehier and Mohammed Ali placed in foster care.
12/02/85	Probable cause hearing, Referee S. Weherman.
12/13/85	Pre-trial. Referee Drake.
12/17/85	Motion for placement in home of relative.

02/27/86 Neglect Petition.

06/24/86 Parent-Agency Agreement.

08/13/86 Rehab Amer found in Wayne County Circuit Court not guilty in death of Samier.

10/28/86 Decision of Martin T. Maher placing Mohammed Ali and Suehier within the jurisdiction of the Probate Court.

12/02/86 Motion to replace attorney for children.

12/02/86 Motion for dismissal of petition.

12/11/86 Neglect petition re: Zinabe Amer.

12/15/86 Dispositional Hearing before Judge Maher.

12/15/86 Order of Judge Martin T. Maher that Mohammed Ali Suehier and Zinabe are within the jurisdiction of the Court.

03/05/87 Motion to remove William E. Ladd as guardian ad litem on the grounds of his racist conduct and beliefs.

03/05/87 Motion to set guidelines re: "admission of responsibility".

03/09/87 Motion to reunite minor children with parents forthwith.

5,7,8,29/87 Statutory Hearing held with Judge Barsamian.

05/29/87 Order of Judge Barsamian after statutory hearing continuing foster care and requiring confession of guilt.

05/29/87 Order barring visitation between

Rehab Amer and Mohammed Ali Amer.

06/03/87 Motion for Reconsideration of Order re: visitation of Minor Child with natural mother.

06/19/87 Application for leave to appeal from statutory review by Judge Barsamian of 05/29/87.

12/11/87 Petition for Rehearing for permanent termination.

12/23/87 Petition for Neutral Psychological Conjoint evaluation.

01/ /88 - 01/09/89 Termination and Statutory Hearing held by Judge Barsamian.

01/09/89 Order of Termination.

01/30/89 Claim of Appeal filed.

02/06/89 Motion for stay of proceedings permitting visitation pending appeal denied by Probate Court.

03/07/89 Leave to Appeal to the Court of Appeals re: visitation pending appeal denied.

05/31/89 Leave to Appeal to Supreme Court re: visitation pending appeal denied.

6/12/90 Court of Appeals opinion.

7/31/90 Supreme Court denial of stay and denial of application for leave to appeal.

9/28/90 Supreme Court of Michigan denial of Motion for reconsideration

1. The essence of such fundamental unfairness lies not in the mere weakness of one party's position, but in the use of a procedure that produces the party's disadvantage, or that allows an opponent to benefit from his own improper conduct producing the disadvantage. State v Denney, 536 A.2d 1242, 1248-1249 (1987)

2. Where a child remains in foster care in the temporary custody of the court following the initial hearing provided by Section 19, the court may make a final determination and order placing the child in the permanent custody of the court, if it finds any of the following:

* * * *

(e) The parent or guardian is unable to provide a fit home for the child by reason of neglect.

(f) The child has been in foster care in the temporary custody of the court on the basis of a neglect petition for a period of at least two years and upon rehearing the parents fail to establish a reasonable probability that they will be able to re-establish a proper home for the child within the following 12 months.

3. ..., when the court intervenes relative to the other children, the court cannot just ignore that which has transpired in the past. Perhaps if the case had initially come to the court as the death, the killing, that might have been more plausible; or, you know, we all

want to believe that parents can't do these things to their children. But in this case you had a severe injury, unexplained, cannot be caused by the child, and then a death. That could not have been inflicted by the child or the other children in the family. (T 1/9/89 p 1728)

4. Mr. and Mrs. Amer present as 'highly ritualistic individuals'.Specifically, the fact that each child is never, by this PO's observation, without the small Holy Koran pinned on the inside of their tee-shirts/undershirts.On a home visit, Mr. Amer stated that the Koran on the children's person was <u>absolutely necessary</u>. This PO did not comment as this information was not new to her understanding of the Arabic culture. (Case History 1/13/86, p 10)

5. Except as provided herein, the juvenile division of the probate court shall have:...
(b) Jurisdiction in proceedings concerning any child under 17 years of age found within the county
(1) Whose parent or other person legally responsible for the care and maintenance of such child, when able to do so, neglects or refuses medical, surgical or other care necessary for his health, morals or well being,...or who is otherwise without proper custody or guardianship; or
(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality or depravity on the part of a parent, guardian or other custodia, is an unfit place for such child to live in, ...

6. The court in all cases involving custody shall state in the order for disposition or any supplemental order of disposition whether the child is placed in the temporary or permanent custody of the court.

7. The relevant presentation is that of blunt injury to the head, to be described below. There is also a small bruise noted on the left cheek. The scalp, forehead, face, neck, trunk and extremities show no evidence of other injury or other pathological changes. The remainder of the external examination is without special note. DESCRIPTION OF INJURIES. HEAD There is a contusion over the occipital region of the head. Examination of the skull reveals a stellate fracture radiating from the occipital area into the left posterior cranial fossa and into the occipital bone to the right parietal bone of the skull. There is contusion with subarachnoid hemorrhage of the cerebellum, tip of the occipital lobe and also contusion of the inferior surface of both frontal lobes of the brain. Minimal subjural hematoma is also noted covering both frontal lobes. INTERNAL EXAMINATION...HEAD The scalp and skull are incised and retracted; the brain is removed. The scalp, skull, meninges and brain show no evidence of trauma or significant pathological changes on transections. Trauma changes are restricted to those previous described.

Dr. Sawait Kanluen testified as follows:

Q. (By Mr. Goldberg, continuing): You keep mentioning two to three story building that would have to be generating the type of

speed if in fact you had that type of speed. If there was a fall either into the bathtub or hitting the wall wouldn't you expect to see some other injuries other than to the skull?

A. Yes, if you had fell from that type of height I would see some other injury. Not only one impact on the head. That is correct, you are right

Q. Did you see any other injuries ?

A. No, I did not.

Q. Did that surprise you?

A. No, I keep saying two or three stories to give a comparison of the speed.

Q. If the child was going at this type of speed that you're describing; the speed that one might fall from a two or three story building or a child might fall and that's the type of speed that was generated, at least in your opinion to create this skull fracture, would you expect to see other injuries?

A. Yes, I do expect to see some other type of injury.

Q. You did not see any in this case ?

A. I did not see any in this case. (T 9/10/86 104-105)

8. The reason the Court is not returning to the parents at this time is because the

deceased child was an abuse ward at a very young age with multiple broken bones in various stages. So, the Court is extremely concerned. It's my ultimate objective to return the children to the parents as quickly as possible with the caveat that those children remain safe." (T 12/15/86 p 4).

9. The parents are to attend counselling and parenting classes. The parents are to give a list of relatives and/or arabic homes for investigation for juvenile placement. DSS and Foster Care homes are to use the children's arabic names. The family is to receive family therapy with Mohammed Ali receiving individual therapy. (Appendix F)

10. So as long as these parents continue to believe that this death was accidental we're going to have a problem about returning these children to those parents. And as long as the therapist that they work with continue to reinforce that, these parents are going to not succeed in achieving return of their children. (T 5/29/87 p. 554-557)

11. THE COURT: .....Now, the point is that one of those two people killed a child. One of them is a killer, the other one is a cover-upper for a killer. Now, this kid, if you read the autopsy, I mean was literally slammed against the wall. This kid did not drown in a bath tub. He didn't just drop dead. You know, something -- somebody -- and these other kids didn't do it. Some adult did something to that kid.
Now, part of the problem here is that we can't get the parents to admit that, that somebody killed this child. One of them killed this child and the other is either covering up for that or can't believe that the other could do it.

****

THE COURT: But at any rate, I am going to deny your motion.
(T 1/12/88, p. 19-31)

12. When the case went to hearing on the permanent custody petition, the issue was not (sic) whether the death of the child established the parents' continuing lack of fitness, but rather whether the efforts made to rehabilitate the family had been sufficiently successful to render the home safe for the children.

13. Q. So at least at that time in February you heard Mohammed Ali tell his father he wanted to come home with him?

A. Yes.

Q. In that same evaluation, at that time was Mrs. Amer holding Mohammed Ali?

A. Certainly during part of it, yes.
(T 10/18/88 878-9)

Q. I take it from your testimony--and is this a correct observation--that the question of whether to terminate parental rights to these children is a very close question. Is that right?

A. Yes. (T 10/18/88 879)

14. Q. (By Mr. Baum, continuing) : Doctor you don't have an opinion to a

reasonable medical certainty that from the point of view of these parents their parental rights should be terminated, do you?

A. I think as I noted, the other option would be to see what happened if they had longer supervised visits to see what would occur.

Q. Would it be appropriate, for example, Doctor, to have them have incremental visits in their home supervised...

A. Ya. (T 12/16/88 at 1622)

15. RECOMMENDATIONS:
I recommend that we work at reuniting the family with intensive therapy. It is very important that we take into consideration the culture, language and religion of the Amer family. I recommend that the children begin to be taught their language and begin to learn about the culture and religion. I also recommend that the needs of the Amer family could be best served in a program such as ACCESS which is geared towards working with Arabic families, Lebanese families, which is sensitive to their needs." (Children's Hospital Report at 9)
.....psychiatric department.(T 12/16/88 Exhibit 14 at 8-9)

16. Mohammed Ali is an Arabic Child placed in a white foster home. He is placed with his sister Suehier.

Projected length of stay is nine months, with the next placement dependent on the outcome of the mother's murder trial. (Updated Service Plan 6/30/86, page 3)

Long Range Goal

A permanency plan will be developed dependent upon the outcome of the second degree murder trial involving the parents, which is currently scheduled to begin on August 7, 1886. (Updated Service Plan 6/30/86 1986 page 6) (a-12)
As of 6/30/86, the Updated Service Plan of the Judson Center stated its Long Range Goal as follows:

A permanency plan will be developed dependent upon the outcome of the second degree murder trial involving the parents, which is currently scheduled to begin on August 7, 1986.

The same Plan specified as an Objective:
A As per the parent agency agreement, the parents will continue to receive counseling from the Arab Community Center on an ongoing basis. (Updated Service Plan,6/30/86 at 6)

17. 5. To attend counseling to acknowledge and accept responsibility for the severe abuse inflicted on Samier Amer, now deceased. (Appendix L).

18. This parent-agency agreement was developed following disposition and findings of fact of the court, in conjunction with the court's orders and expectations and what the Department and Judson Center felt needed to be done in

order to think about returning the children. (T 10/18/88 at 928-929).

19. Q. In other words, if their therapist(Dr. Epstein) were to come to court and say experientially I believe they have acknowledged that, although they have not verbalized that, and they have successfully dealt with the underlying mechanisms that I was just mentioning before, would that satisfy your requirement as a social worker?

A. My requirement as a social worker through Judson Center was based on the court findings and a court order and compliance with the Department of Social Services as well. And I don't know that I can answer your question.
(6/16/88 403)

20. Q. Well, why shoudn't they be returned home with regard to Mrs. Amer ?...
A. I have to combine the whole clinical picture. Okay. Because she experiences loss and separation, that's traumatic for her. She already has a psychological pre-disposition, if you will-- Mr, Derr can testify further-- to anxiety. Okay? That combines. Right now I believe how she experiences Mohammed Ali's behavior is rejection. All right? Over the long run, I think that would be very difficult for her to deal with.(T.647)

21. Because that was exactly what we felt the court order wanted the parents to do, and besides that the Department and Judson Center felt the parents needed to do it....Abuse has been an issue since

the beginning of this case when Samier first came into care; it's never been dealt with. (T. 530)

22. Because abuse is an issue. No matter how many times we have to say this or try and get around it, it's always been abuse, and it will be until it's over with (T.933)

23. Because I still have not seen evidence that any type of abuse or failure to protect has been acknowledged by either one of these parents, and I believe it has been too long. The children deserve a permanent home and some ending to this foster care situation that they're in. (T. 942)

24. Well, Mohammed has indicated-- He indicates that, you know, his feelings for his parents. He loves his father. He indicates that he kind of-- He doesn't know how he feels for his mother. Anytime I try and determine or to see if he expresses some love in terms of his mother, he kinds of refrains from that. The only thing that he has really-- He misses her. He misses her, which is normal for a child being away from his normal parents. But then Mohammed has during sessions also indicated that he's very much afraid of her. (T.1202).

25. The conditions that led to the adjudication (by a preponderance of the evidence) continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the age of the child." MCL 712A.19(b)(c)(i); Other conditions exist that cause the child to come within the jurisdiction of the court, the parent has received recommendations to rectify those conditions, the conditions have not been

rectified by the parent..., and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the age of the child. (c)(ii);

or

The parent , without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the age of the child. (d).

26. The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the state moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

27. In Santosky, we described the parent's desire for, and right to, the companionship, care, and custody of his or her children as "an interest far more precious than any property right.

* * * *

Second, . . . [t]he contestants in a termination proceeding are the state and individual. Because the state has superior resources, and because an adverse ruling in a criminal, civil

commitment, or termination proceeding has especially severe consequences for the individual affected, it is appropriate for society to impose upon itself a disproportionate share of the risk of error in such proceedings.

28. ... the probate court did not terminate respondents' rights solely because they failed to comply with the treatment plan. The physical abuse and death of Samier was clear and convincing evidence of neglect sufficient enough to terminate the parents' custody rights in the absence of any proof that this behavior would not occur again." Court of Appeals Opinion, page 5-6.

29. The touchstone of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing a self-incrimination which the amendment forbids.
Id at 806.

No. 90-1282 (3)

Supreme Court, U.S.
FILED
MAR 14 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1990

REHAB AMER and AHMED AMER,

Petitioners,

v.

DEPARTMENT OF SOCIAL SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

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38 pp

QUESTION PRESENTED FOR REVIEW

Whether the Michigan procedure for termination of parental rights comports with due process and federal statutory requirements.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
JURISDICTION	1
STATUTORY PROVISIONS AND COURT RULES INVOLVED	1
STATEMENT OF THE CASE	4
REASONS FOR DENYING THE WRIT	10
I THE PROBATE COURT UTILIZED THE PROPER STANDARD OF PROOF ...	10
Effect of Temporary Foster Care Determination	13
Fifth Amendment	21
II COMPLIANCE WITH FEDERAL STATUTES	27
III JUDICIAL BIAS	29
CONCLUSION	31

TABLE OF AUTHORITIES

Pages

Cases:

Baltimore City Department of Social Services v Bouknight, 493 US ___; 110 S Ct 900 (1990) ... 25

Cleveland Board of Education v LaFleur, 414 US 632 (1974) 20

Francis v Franklin, 471 US 307 (1985) 20

Grayned v City of Rockford, 408 US 104 (1972) 13

In Interest of H.R.K., 433 NW2d 46 (Iowa App, 1988) 24

In re Anderson, 155 Mich App 615; 400 NW2d 330 (1986) 19

In re Bedwell, 160 Mich App 168; 408 NW2d 65 (1987) 11

In re Gentry, 142 Mich App 701; 369 NW2d 889 (1985) 13

In re Jacobs, 433 Mich 24; 444 NW2d 789 (1989) 14

In re Mathers, 371 Mich 516; 124 NW2d 828 (1963) 13

In re Miller, 433 Mich 331; 445 NW2d 161 (1989) 17

In re Tedder, 150 Mich App 688; 389 NW2d 149 (1986) 12

Pages

In the Matter of Atkins,
112 Mich App 528;
316 NW2d 477 (1982) 11

In the Matter of Bidwell, 129 Mich
App 499; 342 NW2d 82 (1983) 13

In the Matter of LaFlure,
48 Mich App 377;
210 NW2d 482 (1973) 11,16,18

In the Matter of Riffe,
147 Mich App 658;
382 NW2d 842 (1985) 14

In the Matter of Schejbal,
131 Mich App 833;
346 NW2d 597 (1984) 12

Krause v Catholic Community
Services, 47 Wash App 734;
737 P2d 280 (1987) 15

Matter of J.W. and A.W.,
415 NW2d 879 (Minn, 1987) 23

Matter of Marshall, 159 Mich
App 683; 406 NW2d 913 (1987) 19

Michigan v Long,
463 US 1032 (1983) 22

Morton v Mancari,
417 US 535 (1974) 27

Santosky v Kramer,
455 US 745 (1982) 10,14

Ulster County Court v Allen,
442 US 140 (1979) 20

Pages

United States v Grinnell Corp,
384 US 563 (1966) 30

United States v One Assortment of
89 Firearms, 465 US 354 (1984) 19

Wainwright v Stone,
414 US 21 (1983) 13

Statutes and Court Rules:

28 U.S.C. § 1257(a) 1

Mich. Comp. Laws 712A.2(b) 14

Mich. Comp. Laws 712A.19a 11

Mich. Comp. Laws 712A.19b 11

Mich. Comp. Laws
712A.19(b)(c)(i)(ii) 15

Mich. Comp. Laws 712A.19(3) 15

1966 PA 182, § 19 15

1972 PA 59 1

1972 PA 59, § 19a 15

1988 PA 224 (eff. April 1, 1989) ...11,15

Michigan Court Rule 5.974(A)
(adopted and amended effective
January 1, 1988; now
5.974(A)(2)(3)) 3

Mich. Court Rule, 1985
5.974(A)(1) 12

Pages

Mich. Court Rule, 1985
5.974(A)(2) and (E)(3) 11

Michigan Court Rule 5.974(E)
(adopted and amended effective
January 1, 1988; now 5.974(F)) 3

JURISDICTION

The judgment of the Michigan Court of Appeals was entered on June 12, 1990. The Michigan Supreme Court thereafter denied leave to appeal on July 31, 1990 and reconsideration on September 28, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS AND COURT RULES INVOLVED

1972 PA 59:

> Sec. 19a. Where a child remains in foster care in the temporary custody of the court following the initial hearing provided by section 19, the court may make a final determination and order placing the child in the permanent custody of the court, if it finds any of the following:
>
> (a) The child has been deserted and abandoned without provision for identification for a period of at least 6 months and the public or private agency having temporary custody of the child has made a reasonable attempt to locate the parent.
>
> (b) The child is left with intent of desertion and abandonment by his parent or guardian in the care of

another person without provision for his support or without communication for a period of at least 6 months. The failure to provide support or to communicate for a period of at least 6 months shall be presumptive evidence of the parent's intent to abandon the child. If, in the opinion of the court, the evidence indicates that the parent or guardian has not made regular and substantial efforts to support or communicate with the child, the court may declare the child deserted and abandoned by his parent or guardian.

(c) A parent or guardian of the child is unable to provide proper care and custody for a period in excess of 2 years because of a mental deficiency or mental illness, without a reasonable expectation that the parent will be able to assume care and custody of the child within a reasonable length of time considering the age of the child.

(d) A parent or guardian of the child is convicted of a felony of a nature as to prove the unfitness of the parent or guardian to have future custody of the child or if the parent or guardian is imprisoned for such a period that the child will be deprived of a normal home for a period of more than 2 years.

(e) The parent or guardian is unable to provide a fit home for the child by reason of neglect.

(f) The child has been in foster care in the temporary custody of the court on the basis of a neglect petition for a period of at least 2 years and upon rehearing the parents fail to establish a reasonable probability that they will be able to reestablish a proper home for the child within the following 12 months.

This act is ordered to take immediate effect.
Approved February 21, 1972.

Michigan Court Rule 5.974(A) (adopted and amended effective January 1, 1988; now 5.974(A)(2)(3)):

(A) General.

(1) Termination of parental rights over a child requires that a statutory basis for termination be established and that termination is in the best interest of the child. Both steps may be accomplished at a single hearing.

(2) The burden of proof is on the party seeking by court order to terminate the rights of the respondent over the child. There is no right to a jury determination.

Michigan Court Rule 5.974(E) (adopted and amended effective January 1, 1988; now 5.974(F)):

(E) Termination of Parental Rights Under MCL 712A.19a; MSA 27.3178 (598.19a). If the parental rights of

> the respondent over the child are not terminated at the initial dispositional hearing, and the child is in foster care in the temporary custody of the court, the court may take action on a supplemental petition that seeks to terminate the parental rights of respondent over the child, but only if the allegations are based on one or more grounds listed in MCL 712A.19a [now MCL 712A.19b] ... .
>
> * * *
>
> (3) Standard of Proof. Except as provided in MCR 5.980, the proofs must be clear and convincing that one or more grounds exist under MCL 712A.19a; [now MCL 712A.19b(3)...], to warrant severing the parent-child relationship. ...

STATEMENT OF THE CASE

This is a termination of parental rights case. The action commenced on April 2, 1984 when Respondent filed a petition with the juvenile division of the Wayne County Probate Court which alleged abuse of Samier Amer (date of birth: November 18, 1983). Samier was

made a temporary ward of the court after a hearing which found no medical explanation for multiple fractures of different ages to the child's arms, legs and collarbone. Report and Recommendation of Referee dated September 4, 1984, Pet. App. 113-118. The court approved placement of Samier with his maternal grandmother and directed parental counseling and participation in parenting classes. Report and Recommendation of Referee dated November 26, 1984. The court permitted extended visitation in the family home after a review hearing on October 18, 1985. Samier died on November 22, 1985.

Samier's death prompted the immediate placement of his siblings Suehier Ahmed (twin sister) and Mohammed Ali (date of

birth: December 11, 1982) in emergency foster care.[1] A temporary custody hearing with regard to these children was held on September 10, October 24 and 28, 1986. After a review of the testimony presented at the hearing by Petitioners, various emergency personnel, attending physicians and the pathologist, the court concluded that Samier's death was not accidental and that Petitioners were

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[1]An amended petition as to these children had been previously filed on July 16, 1984.

responsible.[2] Tr. 10/28/86, pp 382-392; see Pet. App. 90-105. The court specifically commented on the credibility of Petitioner Rehab to the effect that she "orchestrate[d] what would sound best to the Court, as opposed to what really happened." Tr. 10/28/86, p 391; Pet. App. 102.

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[2]The medical examiner's report dated November 23, 1985, stated that Samier: "... died of blunt injuries to the head causing stellate fracture of the skull over the back of the head (subdural hematoma) and contusions of the brain. There was one impact to the back of the head. The pattern of injuries indicated that the head was moving at a great velocity and struck a fixed object."

At the hearing, the pathologist explained that the point of impact was on the back of the head and that the contusion to the brain was on the opposite side of the impact. Tr. 9/10/86, p 75. This was inconsistent with a bathtub slip and fall as claimed by Petitioners. Tr. 9/10/86, pp 76-78. This view was shared by the treating physician, the director of Intensive Care Unit at Children's Hospital of Michigan. Tr. 9/10/86, pp 113-116, 119-120.

Petitioners' third child, Zinabe Ahmed, was born on December 9, 1986. By order of December 15, 1986, the Court approved continuing foster care placement for all three children with therapy designed to reunite the family.

The opinion of the Court of Appeals summarizes the results as follows:

> "In subsequent proceedings, medical personnel who evaluated the parents testified to their belief that therapy that failed to deal with Samier's death would not prove helpful in rehabilitating the family. The parents would not admit to the abuse and it was felt that they had to address this issue before the other children could be safely returned to the family home.
>
> "On December 16, 1987, the Department of Social Services filed a petition requesting the permanent termination of the respondents' rights to their children in part because they had refused to accept responsibility for the nonaccidental death of Samier. During the dispositional hearing, the medical personnel repeated their belief that the respondents needed to acknowledge the

> child abuse before there could be a meaningful change in their parenting behavior. The medical experts were convinced that a repeat of what occurred to Samier was possible. Furthermore, the parents' inability to deal with the abuse after years of therapy indicated that the family was untreatable. Denial had become fixed. Nothing more could be done for the family and a permanent solution was in the best interests of the children. The probate court found this testimony persuasive and on January 9, 1989, entered its order terminating the parental rights of Rehab and Ahmed Amer. Opinion, p 4; Pet. App. 8-9.

The Probate Court entered an order on January 9, 1989 which terminated Petitioner's parental rights and committed the children to the Michigan Children's Institute. The Michigan Court of Appeals affirmed the lower court's decision in an unpublished per curiam opinion dated June 12, 1990 (Docket No. 114910); Pet. App. 2-16. The Michigan Supreme Court denied leave to appeal by order entered

July 31, 1990 (Docket No. 89463); Pet. App. 124-125. A motion for reconsideration was denied by the Supreme Court on September 28, 1990; Pet. App. 126.

REASONS FOR DENYING THE WRIT

I

THE PROBATE COURT UTILIZED THE PROPER STANDARD OF PROOF.

The proceedings below which resulted in termination of Petitioners' parental rights were fully consistent with this Court's decision in Santosky v Kramer, 455 US 745 (1982). Santosky adopted a "clear and convincing evidence" standard of proof for such adjudications in order to strike a fair balance between the rights of the parents and the legitimate concerns of the state. 455 US at 769. Michigan law incorporates this standard

in parental rights termination cases. Mich. Court Rule, 1985 5.974(A)(2) and (E)(3); In the Matter of LaFlure, 48 Mich App 377, 388; 210 NW2d 482 (1973); In the Matter of Atkins, 112 Mich App 528, 540-541; 316 NW2d 477 (1982). This burden applies to the substantive statutory grounds which justify a permanent custody order. In re Bedwell, 160 Mich App 168; 408 NW2d 65 (1987) (discussing application of standard to termination under former Mich. Comp. Laws 712A.19a).[3] Once the above standard is met, the probate court exercises discretionary

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[3]This statute applied where the child was in foster care under court jurisdiction and supervision. This parental rights termination provision which is at issue in this case (1972 PA 59) was amended and substantially rewritten by 1988 PA 224 (eff. April 1, 1989) and is now set forth in Mich. Comp. Laws 712A.19b.

authority to consider the best interest of the child. Mich. Court Rule, 1985 5.974(A)(1); In re Tedder, 150 Mich App 688; 389 NW2d 149 (1986); In the Matter of Schejbal, 131 Mich App 833, 836; 346 NW2d 597 (1984) [best interest of child alone can not justify termination under § 19a].

Petitioners here appear to acknowledge that Michigan law requires the agency to establish grounds for termination by clear and convincing evidence. Petition, p 28. They argue instead that the "statutory scheme" and the proceedings in this case effectively undermined

these requirements.[4] The Petition presents several interrelated claims in this regard which, for purposes of this response, may be addressed as follows.

Effect of Temporary Foster Care Determination.

In accordance with the philosophy that efforts to reunite the family should proceed permanent termination of parental rights, In re Mathers, 371 Mich 516; 124 NW2d 828 (1963), Michigan law allows the Probate Court to assume jurisdiction of a child and direct placement in temporary

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[4]The statutory terms have been construed by Michigan courts. In re Gentry, 142 Mich App 701; 369 NW2d 889 (1985); In the Matter of Bidwell, 129 Mich App 499; 342 NW2d 82 (1983). The terms are sufficiently definite for due process purposes. See Grayned v City of Rockford, 408 US 104, 108-109 (1972); Wainwright v Stone, 414 US 21, 23 (1983).

foster care when a preponderance of the evidence shows one of the grounds set forth in Mich. Comp. Laws 712A.2(b); In the Matter of Riffe, 147 Mich App 658, 669-670; 382 NW2d 842 (1985). The objective of the statutory scheme at this "jurisdictional phase" is "to protect children from an unfit home environment and to preserve the existence of the family unit if ... at all possible". In re Jacobs, 433 Mich 24, 37; 444 NW2d 789 (1989).

There is nothing in Santosky which suggests the constitutional necessity of a stricter standard of proof at this stage. If anything, insistence on an elevated standard for temporary custody could well operate to defeat the ameliorative goals of assisting recovery of the

family unit by casting the state in the role of parental adversary instead of helpful intervenor. See Krause v Catholic Community Services, 47 Wash App 734; 737 P2d 280, 283 (1987).

In this case, applicable statutory provisions required court review of temporary wardship every six months, 1966 PA 182, § 19.[5] Parental rights are subject to termination where the parents fail to reestablish a proper home or at least the likelihood of a proper home in the forseeable future. 1972 PA 59, § 19a.[6]

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[5]1988 PA 224 (effective April 1, 1989) now provides for review hearings every ninety-one (91) days during the first year of wardship. Mich. Comp. Laws 712A.19(3).

[6]This section was revised by 1988 PA 224 (eff. April 1, 1989) and is now contained in Mich. Comp. Laws 712A.19(b)(c)(i)(ii).

In LaFlure, 48 Mich App at 386, the Michigan Court of Appeals rejected the notion, which Petitioners contend operated here, that the same standard of proof which supported temporary wardship also justified termination of parental rights. Instead, the court held that "parental rights may not be terminated unless the state proves by clear and convincing evidence that such termination is warranted." Id. LaFlure explained that the statutory scheme simply placed the burden of going forward with the evidence, as opposed to the burden of persuasion (proof), on the parents and that the effect of such a rebuttal presumption was minimal because "[i]t merely requires the parents to give any indication whatsoever that the family situation has improved." 48 Mich App at

388 (emphasis added). See also In re Miller, 433 Mich 331; 445 NW2d 161 (1989) [prima facie case established by two years of custody on neglect petition].

Contrary to Petitioners' assertions, this is not a case where the trial court applied an incorrect standard of proof or relied exclusively on prior determinations. Here the court considered extensive testimony from a number of live witnesses in addition to exhibits and records. Transcript of Permanent Custody Hearing, Volume 16, p 1714 (hereinafter Tr (Volume number), p __). See Pet. App. 16-47. The court found that Petitioners could not provide a fit home for the children given "that the experiential acceptance of responsibility has failed in the past, and there is no reason to

believe it's going to work in the future." Tr 16, p 1733, Pet. App. 43-44. The court noted that three and a half years of effort had "gained very little" and that "[t]here's been absolutely no indication that if the court were to continue this matter into the future that there would be change." Id. The court thus found "that there is clear and convincing evidence that subparagraphs (e) and (f) of MCLA 712A.19a have been established." Id. at 1734. Pet. App. 44-45.

Under state law the court could properly consider evidence adduced at prior hearings, LaFlure, 48 Mich App at 391. In this regard, abuse of one child is probative of a parent's proclivity to abuse other children and may justify

change in custody. Matter of Marshall, 159 Mich App 683; 406 NW2d 913 (1987); In re Anderson, 155 Mich App 615; 400 NW2d 330 (1986). Consideration of such evidence does not represent adoption of an unconstitutional standard of proof or a shift in the burden of persuasion.[7]

In these circumstances, neither the statutory scheme or proceedings in this case employed irrebuttable presumptions in the termination of Petitioners' parental rights. Irrebuttable or conclusive presumptions are substantive in nature and foreclose the person against whom they are involved from demonstrating in a

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[7]The acquittal of Petitioner Rehab on criminal charges in Samier's death is not entitled to collateral estoppel effect in these civil proceedings. United States v One Assortment of 89 Firearms, 465 US 354 (1984).

particular proceeding "that applying the presumption ... will in fact not further the lawful governmental policy the presumption is designed to effectuate." Cleveland Board of Education v LaFleur, 414 US 632 (1974). Mandatory rebuttable presumptions are procedural devices which permit proof of one fact to establish another unless the party against whom the presumption operates can persuade the trier of fact not to make such findings. Francis v Franklin, 471 US 307, 317 (1985). See Ulster County Court v Allen, 442 US 140, 167 (1979) (mandatory presumptions are impermissible in a criminal case unless "the fact proved is sufficient to support the inference of guilty beyond a reasonable doubt). The above are significantly different from the burden of production at issue in this

case. The latter does not implicate constitutional concerns.

Petitioners' real argument in this case is that the probate court's decision was incorrect. The application of the appropriate standard of proof to a discrete set of facts, however, does not present an important constitutional question which this court should review.

Fifth Amendment

Petitioners contend that the probate court required them to "confess" to child abuse as a prerequisite to family reunification. This condition, Petitioners argue, violated their Fifth Amendment privilege against self-incrimination.

Both Petitioners voluntarily testified at various hearings in this matter

and participated in court-ordered counseling without assertion of a Fifth Amendment claim. The Court of Appeals below found that a failure to raise this issue at the trial court level waived appellate review. Opinion, p 6. Pet. App. 14-15. This procedural bar represents an adequate and independent state ground under the "plain statement" rule of Michigan v Long, 463 US 1032 (1983), to preclude review by this court.

In any event, Petitioners claim does not present a substantial federal question. Petitioners' actual complaint is that the trial court refused to accept their explanations for the obvious abuses suffered by Samier. The record, however, demonstrates an ample basis for the trial court's conclusions in this regard.

The focus of the court in this context was not an extraction of inculpatory statements from Petitioners, but instead sought some assurance that abusive behavior patterns had altered sufficiently to permit return of Petitioners' other children. In Matter of J.W. and A.W., 415 NW2d 879 (Minn, 1987), the Minnesota Supreme Court discussed the effect of a parent's failure to accept responsibility for abuse of a child in relation to Fifth Amendment protections:

> "What the parents would like to claim, although of course they cannot, is that their responsibility for the death of a child and the inferences arising therefrom is privileged and may not be considered in determining their suitability as parents. Admittedly, the parents are confronted with a dilemma, but it is not a dilemma that triggers the Fifth Amendment to the extent the parents would wish. In the lexicon of the Fifth Amendment, the risk of losing the children for failure to undergo meaningful therapy is neither a 'threat' nor a 'penalty' imposed by

> the state. It is simply a consequence of the reality that it is unsafe for children to be with parents who are abusive and violent. Supra at 883-884 (footnotes omitted)."

A requirement that parents acknowledge and rectify deficiencies which pose a threat to their children as evidenced by prior abusive behavior does not condition one constitutional right (maintenance of the family unit) on forfeiture of another (self-incrimination). It is instead simply the necessary expression of the state's right and obligation to protect children at risk. Termination in such a situation is thus not a sanction for the exercise of a constitutional right, but the logical result of a failure to correct parental deficiencies. See In Interest of H.R.K., 433 NW2d 46, 50 (Iowa App, 1988).

In Baltimore City Department of Social Services v Bouknight, 493 US ___; 110 S Ct 900 (1990), this Court held that a custodial parent could not invoke the Fifth Amendment privilege to resist a court order to produce the child. The court stated that in such a noncriminal setting "[t]he possibility that a production order will compel testimonial assertions that may prove incriminatory does not, in all contexts, justify invoking the privilege ...", 110 S Ct at 905. The decision emphasized that state's noncriminal regulatory interest in the care and safety of children in need of assistance. 110 S Ct at 907. Finally, the Court noted various limitations on the use of any incriminatory statements in subsequent criminal proceedings.

The state in the present case did not seek testimonial admissions for use in subsequent criminal proceedings, but instead sought cooperation and progress in necessary therapy. As to Petitioner Rehab, her acquittal of criminal charges effectively eliminated any possible subsequent use of statements made in this regard. Petitioner Ahmed would have retained Fifth amendment and, possibly state law privilege, protections from use of any incriminating statements made over his objection in subsequent criminal actions.

In these circumstances, Petitioners have failed to present an important constitutional claim for review by this Court.[8]

II

COMPLIANCE WITH FEDERAL STATUTES.

Petitioners contend that efforts to reunite the family in this case did not comply with federal law. Petition, p 29. Petitioners cite no authority for the proposition that any such alleged noncompliance affects the validity of an otherwise lawful termination order.

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[8]Petitioners' equal protection argument (Pet. p 24, n. 5) is without merit in that special treatment of Native American families through enhanced proof requirements is rationally related to a unique federal policy. See Morton v Mancari, 417 US 535, 555 (1974).

Essentially, Petitioners' argument is that the probate court should have adopted a different treatment modality than the one utilized in this case.

During the foster care period, the Petitioners were provided with regular weekly visitation, weekly meetings with social workers and quarterly conferences with all parties to discuss progress and problems in the case. The Petitioners were also referred to Parents Anonymous and to a therapist for psychological counseling. The children received supervision in the foster home and the oldest child was provided with individual therapy (Tr 9, pp 933-941). In addition to providing services to the family, the agencies prepared periodic case plans. Tr 5, pp 353-360, 364, 371, 376, 379.

The approach taken by both services and plans were towards resolving the problems and conditions which resulted in the childrens' removal from the home. Tr 9, pp 933, 939. The above efforts to reunite the family were both reasonable and appropriate under the circumstances of this case.

Petitioners' claim in this regard does not present an important question for review by this Court.

III

JUDICIAL BIAS.

Petitioners' conclusorily allege judicial bias based on remarks and orders during the course of proceedings in this case.

This claim was raised for the first time on appeal to the Michigan Court of

Appeals. There was no objection or motion to disqualify based on bias raised below. Petitioners, in fact, had requested reassignment of this case to the presiding judge. Tr 16, p 1722.

For an alleged bias and prejudice to be disqualifying, it must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. United States v Grinnell Corp, 384 US 563, 583 (1966).

Petitioners' claim in this regard is meritless.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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ORIGINAL

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IN THE

IN THE SUPREME COURT OF THE UNITED STATES

October 1990 Term

REHAB AMER and AHMED AMER,

Petitioners,

v.

DEPARTMENT OF SOCIAL SERVICES,

Respondent.

On Writ of Certiorari To
the Court of Appeals of the State of Michigan

RESPONDENT CHILDREN'S BRIEF IN OPPOSITION

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
WITHOUT AFFIDAVIT IN SUPPORT

CERTIFICATE OF FILING

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CHILDREN'S QUESTIONS PRESENTED

1. WHETHER PETITIONERS' DUE PROCESS RIGHTS, GUARANTEED BY THE FOURTEENTH AMENDMENT, WERE VIOLATED WHERE THE TRIAL COURT ORIGINALLY ASSUMED JURISDICTION OVER THEIR CHILDREN BASED UPON A PREPONDERANCE OF THE EVIDENCE STANDARD AND SUBSEQUENTLY TERMINATED THEIR PARENTAL RIGHTS BASED UPON CLEAR AND CONVINCING EVIDENCE?

2. WHETHER THE BURDEN OF PROOF WAS SHIFTED, VIOLATING PETITIONERS' DUE PROCESS RIGHTS GUARANTEED BY THE FOURTEENTH AMENDMENT, WHERE THEY WERE REQUIRED TO ACCEPT RESPONSIBILITY FOR THE NON-ACCIDENTAL DEATH OF THEIR CHILD AND THE CHILDREN WERE IN FOSTER CARE FOR MORE THAN TWO YEARS PURSUANT TO CONTINUING COURT ORDERS?

3. WHETHER PETITIONERS' RIGHT TO REMAIN SILENT, GUARANTEED BY THE FIFTH AMENDMENT, WAS VIOLATED WHERE THEY WERE REQUIRED TO ACCEPT RESPONSIBILITY FOR THE NON-ACCIDENTAL DEATH OF THEIR CHILD IN A CIVIL PROCEEDING SEEKING TERMINATION OF THEIR PARENTAL RIGHTS?

4. WHETHER THERE WAS SUFFICIENT EVIDENCE TO TERMINATE PETITIONERS' PARENTAL RIGHTS?

5. WHETHER THE SERVICES PROVIDED TO PETITIONERS BY THE MICHIGAN DEPARTMENT OF SOCIAL SERVICES AND ITS AGENTS WERE SO INADEQUATE AS TO VIOLATE FEDERAL STATUTES AND REGULATIONS APPLICABLE TO FOSTER CARE?

TABLE OF CONTENTS

CHILDREN'S QUESTIONS PRESENTED i

TABLE OF CONTENTS . . . . . ii-iii

TABLE OF AUTHORITIES . . . . . iv - viii

JURISDICTION OF THE COURT 1-2

RESPONDENT CHILDREN'S STATEMENT OF THE CASE 3-17

REASONS WHY THE WRIT SHOULD BE DENIED 18

1. Petitioners' Burden of Proof Argument Was Never Raised In Any Of The Proceedings In The State Court, Nor Was It Addressed By The Michigan Court of Appeals. Further, That Argument Is Without Legal Merit Or Support . . . 18-22

2. There Was No Impermissible Shift Of The Burden Of Proof Where The Trial Court Had Previously Found That The Parents Were Responsible For The Non-Accidental Death Of One Of Their Children, They Were Required To Assume Responsibility For The Death And The Children Were In Foster Care For More Than Two Years Pursuant To Continuing Court Orders . . 22-26

3. Petitioners' Right To Remain Silent Was Not Violated Where They Were Required To Accept Responsibility For The Non-Accidental Death Of Their Child In A Civil Proceeding Seeking Termination Of Parental Rights 26-33

4. Review Of Factual Determinations Of The State Trial And Appellate Courts Is Not A Matter Properly Reviewed By This Court And There Was Sufficient Evidence Presented In The Trial Court To Support Termination Of The Parents Rights 33-34

5. Appropriate Services Were Provided To Petitioners By The Michigan Department Of Social Services And Its Agents And There Was No Violation Of Federal Law, Relating To Foster Care, Which Could Merit Review By This Court . . 34-37

6. Petitioners' Application For The Writ Of Certiorari Should Be Denied Because Further Proceedings In This Case Would Not Be In The Best Interests Of The Children 37-41

CONCLUSION 41

PROOF OF SERVICE

TABLE OF AUTHORITIES

CASES: PAGE(S):

Baltimore City Department of Social Services v Bouknight, 493 US ____, 107 LEd 2d 992; 110 SCt 900 (1990) 29

Barker v Palmigiano, 425 US 308; 96 SCt 28

Branti v Finkel, 445 US 507 (1980) 1551; 47 LEd 2d 810 (1976) 33

Brown v United States, 356 US 148 (1958). 28

Cardinale v Louisiana, 394 US 437 (1969) . . 1, 2, 19

Dutchess County DSS v Mr. G., 141 Misc 2d 641; 534 NYS 2d 64 (Fam Ct. 1988) . . . 31, 32, 36, 38

Dymenstein v State, 720 P 2d 42 (Alaska App 1986) . 32

Ferguson v Georgia, 365 US 570 (1965) 18, 26

Graver Mfg. Co., v Linde Co., 336 US 271 (1949) . . 33

In re Interest of Brungardt, 211 Neb 519; 319 NW2d 109 (1982) 32

In re Interest of CDC, 455 NW2d 801 (Neb 1990) . . 38

In re Interest of Two Children, 477 So2d 888 (La App 4, Cir 1985) 32

In Interest of K.L.C., 372 NW2d 223 (Iowa 1985) . . 32

In Interest of R.W.B., 241 NW2d 546 (ND 1976) . . . 32

In Interest of T.D.H., 344 NW2d 268 (Iowa 1983) . . 32

In re Interest of V.B., 220 Neb 369; 370 NW2d 119 (1985) 32

In re Futch, 144 Mich App 163 (1983) 24, 29

In re Gentry, 142 Mich App 701 (1985) 26

In re Jessica B., 254 Cal Rptr 883 (Cal App 5 Dist, 1989) 31

In re Juvenile Appeal (84-AB), 192 Conn 254; 471 A2d 1380 (1984) 32

In re Lamkin, 355 US 59 (1957) 18, 26

In re Martin, 167 Mich App 715 (1988) 26

In re Micah S., 198 Cal App 3d 557; 243 Cal Rptr 756 (Cal App 6 Dist 1988) 38, 39

In re Miller, 433 Mich 331 (1989) 23

In re Ryan M., 513 A2d 837 (Me, 1986) 28

In re Schejbal, 131 Mich App 833 (1984) 38

In re Springer, 172 Mich App 466 (1988) 36

In re Stricklin, 148 Mich App 659 (1986). 28

In the Matter of Adrianson, 105 Mich App 300 (1981) 16

In the Matter of Amer, Mich Ct Apps No. 114910 (1990) 18, 26, 33, 35

In the Matter of Tammie Z., 66 NY 2d 1; 484 NE2d 1038 (1985) 21, 22

Layne & Bowler Corp. v Western Well Works, 261 US 387 (1923) 26, 34

Ledbetter v Brown City Bank, 141 Mich App 692 (1985) 18, 26

Lefkowitz v Turley, 414 US 70 (1973) 27, 28

Lehman v Lycoming County Children's Services Agency, 458 US 502 (1982) 34, 35, 38

Long v Long, 255 NW2d 140 (Iowa 1977) 32

Matter of Adoption of Embick, 351 PA Super 491; 506 A2d 455 (1986) 32

Matter of Ferris, 151 Mich App 736 (1986) 16

Matter of Welfare B.C., 356 NW2d 328 (Minn App (1984) 32

Matter of Welfare of J.W. and A.W., 415 NW2d 879 (Minn, 1987) 30

Matter of Welfare of V.H., 412 NW2d 389 (Minn App 1984) 32

Matter of Nathaniel T., 67 NY 2d 838; 492 NE2d 775 (1986) 36

Matthews v Eldridge, 424 US 319 (1976) 20

Michigan v Tyler, 436 US 499; 56 LEd2d 486; 98 SCt 1942 (1978) 1

Moore v Sims, 442 US 415 (1979) 34

NLRB v Hendricks County Rural Electric Corp., 454 US 170 (1981) 33, 35

People v Anderson, 409 Mich 474 (1980); cert den 449 US 1101 29

People v Guy, 121 Mich App 592 (1982) 28

People v Johnson, 382 Mich 632 (1969); cert den 397 US 1079 28

People v Draper, 150 Mich App 481 (1986) 32

Rice v Sioux City Cemetary, 349 US 70 (9155) . 26, 33

Riviera v Minnich, 483 Us 574 (1987) 22

Sanabria v United States, 437 US 54 (1978) 29

Santosky v Kramer, 455 US 745, (1982) . 19, 20, 21, 38

Stanley v Illinois, 405 US 645 (1972) 22

State v Tunnell, 51 Wash App 274, 753 P2d 543 (1988) 32

Sylvander v New England Home for Little Wanderers, 584 F2d 1103 (CA 1, 1978) 39

Texas v Mead, 465 US 1041 (1984) 33

United States v Floyd, 496 F2d 982 (CA 2, 1974) . . 32

United States v Gainey, 380 US 63 (1965) 24

United States v Hall, 792 F2d 941 (CA 9, 1986) . . 32

STATUTES & COURT RULES:

Ark. Stat. Ann. §9-27-325(b)(2) 20

Colo. Rev. Stat. §19-3-505(i) (Supp 1990) 20

D.C. Code Ann. §16-2317(b)(2) 20

Fla. Stat. Ann. §39-408(2)(b) 20

Ky. Revd Stat. Ann. §620.100(3) 20

Maine Revd Stat. Ann., Tif. 22 §4035.2 20

Md. Cts & Jud. Proc. Code §3-819(d)(1989) 20

MCLA 710.56 17

MCLA 712.56(2) 37

MCLA 712A.18(i)(a)-(e) 21

MCLA 712A.19a(a)-(f) 19, 20

MCLA 712A.19b 20

MCLA 712A.19b(3)(b) 26

MCLA 712A.19b(3)(c) 26

MCLA 712A.20 19

MCR 5.903(A)(19) 19, 20

MCR 5.972(C)(1) 19

MCR 5.974 19

MCR 5.974(A) 19

MCR 5.974(A)(2) 19

MCR 5.974(F)(3) 38

Miss Code Ann. §43-231-561(3) (1981) 20

N.H. Rev Stat. 169-c:13 (1990) 20

N.J. Stat. Ann. §9:6-8.46b (Supp 1990) 20

N.Y. Fam Ct Act §1046(b) (1983) 20

Ore Rev Stat. §419.500 (1989) 20

Sup Ct Rule 14.1 (1990 Rev) 26

Sup Ct Rule 14.1(j) (1990 Rev) 33

Sup Ct Rule 14.3 (1990 Rev) 33

Sup Ct Rule 23 (1990 Rev) 38

Texas Fam Code §11.15(a) (Vernon Supp 1989) 20

42 USC 671 et seq 22, 34, 36, 38

42 USC 675 37

42 USC 675(5)(B) 37

42 USC 675(5)(C) 37

SECONDARY AUTHORITIES:

Coleman, Hon. Mary S., et.al; Coleman Commission Report on Permanency Planning, pp. 11, 33 39

Comment, "Dependency Proceedings: What Standard of Proof" 14 San Diego L Rev 1155 (1977) . . . 21, 22, 29

Goldstein, Freud & Solnit, Beyond the Best Interest of the Child, (The Free Press, 1979) 39, 40

National Council of Juvenile and Family Court Judges, etal., Making Reasonable Efforts: Steps for Keeping Families Together, pp 66-69, 72-73; 36

Patton, "The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings", 24 Georgia L Rev 473 (1990) 29

Shotton, A., "Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later" 26 Cal Western L Rev 223 (1990) 36

JURISDICTION OF THE COURT

Petitioners assert that this court has jurisdiction pursuant to **28 U.S.C. §1257(a).** However, petitioners have failed to establish that at least two of their questions presented have been properly preserved for review by this court. First, petitioners' question relating to the two different burdens of proof applied at the various stages of the juvenile court proceedings **(Petitioners' Question I, 1)** was never presented by petitioners in the state court, either at the trial court or appellate level. Further the issue was not addressed by the Michigan Court of Appeals in its decision below. **(See Petitioners' Appendix A)** This court will not decide federal constitutional issues raised before for the first time in the review of state court decisions. **Cardinale v Louisiana, 394 US 437; 22 LEd2d 398; 89 SCt. 1162 (1969).** Second, petitioners' Fifth Amendment issue **(Petitioners' Question, I, 2 (sic))** was not properly preserved for review because it was not raised at the trial court level, thus excluding it from review by the state appellate court. **(See, Opinion of Court of Appeals, pp 14-15; Petitioners' Appendix A)** The failure to present such federal issues in compliance with state procedure precludes review of those issues by this court. **Michigan v Tyler, 436 US 499; 56 LEd2d 486; 98 SCt. 1942 (1978)** Petitioners' questions numbered I, 3 and I, 4 are subject to similar jurisdictional defects because they are dramatically different from those presented

to the state appellate court and there is no evidence that they were raised in the trial court. In fact, from the language presented here, one can only speculate as to the relationship these questions have to the issues presented in the state court. This should not be enough to invoke the discretionary jurisdiction of this court. See, **Cardinale** v **Louisiana**, **supra**.

RESPONDENT CHILDREN'S STATEMENT OF THE CASE

This family originally came to the attention of the authorities in March of 1984, when two reports of suspected child abuse **(DSS Form 3200's)** were received by the Wayne County Michigan Department of Social Services **(hereinafter DSS).** These reports related to allegations of injuries suffered by the child, Samier Amer (d.o.b. 11/18/83). On April 2, 1984, a petition was filed with the Wayne County Juvenile Court **(hereinafter "court")**, requesting that the court assume jurisdiction over the child. On September 4, 1984, an adjudicatory hearing was concluded before Referee Gail McKnight. Referee McKnight assumed jurisdiction over the child Samier. In doing so the court found that the child had suffered fractures of the arm, the legs and the collarbone, being five in total. These fractures were of different ages. The testimony also established that tests had been done to rule out bone problems and that there was no medical reason for the child to have a large number of fractures. The fractures were described by one medical witness to be due to child abuse. **(See, Report and Recommendation of Referee 9/4/84, Petitioners' Appendix H.)**

On November 26, 1984, a dispositional hearing was held before Referee McKnight. The child was ordered placed with the maternal grandmother and the parents were ordered to be involved in counselling and parenting classes.

The first statutory review hearing **(pursuant to MCLA 712A.19)**[1] was concluded on October 18, 1985, before Referee Chester Drake (Referee McKnight's successor). Referee Drake ordered that the child be continued as a temporary court ward, and that he be allowed to have an extended visit in the parents' home, with supervision two days a week and individual and family therapy. **(Statutory Report, filed October 25, 1986.)** The child had been allowed to go home, due at least in part, to a recommendation by Dr. Herman Schornstein, who had stated that due to the cooperation and openness shown by the parents the child could be safely returned home despite their failure to get to the roots of the abuse of the child **(T, 411-412).** On November 22, 1985, the child Samier Amer died. On November 22, 1985, a preliminary placement order was entered by the court, ordering that the children, Mohammed Ali Amer and Suehier Amer (Samier's surviving twin) be placed in emergency foster care. On November 25th and December 2, 1985, a preliminary hearing was held before Referee Seymour Weberman. The children were ordered to be placed in emergency foster care and a petition was authorized. A petition was filed on December 5, 1985, requesting that the court take jurisdiction over the children **(T, 1717-1718).**

1This statutory section has since been substantially rewritten. See, MCLA 712A.19; P.A. 1988, No. 224, Sec. 2, Effective April 1, 1989. All proceedings in the instant case were conducted pursuant to the old statute.

On November 23, 1985, Dr. Sawait Kanluen, an Assistant Wayne County Medical Examiner, conducted an autopsy of the deceased child Samier Amer. His opinion was that the child:

> **"...died of blunt injuries to the head causing stellate fracture of the skull over the back of the head (subdural hematoma) and contusions of the brain.**
>
> **There was one impact to the back of the head. The pattern of injuries indicated that the head was moving at a great velocity and struck a fixed object.**
>
> **The manner of death is classified as a homicide."**
>
> **Medical Examiner's Report, 11/23/85.**

The doctor explained his conclusions in his testimony at the adjudicatory hearing on September 10, 1986, before Judge Martin T. Maher:

> **A. In consideration of the injuries, the extent of the injury, it's my opinion that the injury happened when the head moving in great speed, high speed and struck a fixed object. The point of impact was on the back of the head.**
>
> **Q. What medical evidence led you to believe that the head was moving at a great speed and hitting a fixed object?**
>
> **A. Because of the contusion of the brain was on the opposite side of the impact. The impact was on the back of the head and the**

contusion of the brain was in the front part of the brain.

***** *** *** *** *** *** *** *** *****

Q. Doctor, in your expert medical opinion in the area of forensic medicine would shaking the child have caused that stellate fracture along with the contusion on the front of the head?

A. You're talking about shaking baby syndrome. No, shaking baby syndrome is different than this particular case. This particular case is either, you know, someone picked the child up and then swings the child, you know, in a high speed. Or, threw the child on to the floor or whatever in that manner. It's not shaking, no. It's just one throw or one swing like you swing a baseball bat or whatever in that kind of fashion. It's not shaking back and forth.

(Adjudication, 9/10/86, pp 75, 79-80.)

The original petition filed 12/5/86, was amended by a motion of counsel for the children. **(Motion to Amend Petition, filed 3/26/86.)** That motion was granted by the court on May 12, 1986. **(Order 5/13/86.)**

A trial was held on the amended petition before Judge Maher on several dates in September and October of 1986. The hearing had been continued, on agreement of the parties, until after the mother's criminal trial on the charge of Second Degree Murder. The mother was found not guilty. **(Petitioners' Appendix, p 150)** Both parents testified at the

hearings. They denied any knowledge of how their son died. **(Adjudication 200-224; 272-286, 312-357.)** At the close of proofs, the court took jurisdiction over the two children, finding that there was neglect of the children and abuse and depravity in the home. **(See, MCLA 712A.2(b)(1) & (2).)** The court specifically found that the child Samier's death was not accidental. **(Adjudication, October 28, 1986, p. 382.)** The court, in its findings of fact, specifically discounted the testimony of the parents on a number of issues. **(Adjudication, supra, pp 383, 386-387, 389, 390-391.)** The court concluded by saying that:

> **"So, if you take all of the testimony put together and you just use common sense and this is a situation where one of these two people is responsible for the death of that child and the other person is responsible for not protecting that child."**
>
> **(Adjudication, supra at 392; Petitioners' Appendix G.)**

On December 9, 1986, Zinabe Ahmed Amer was born. On December 10, 1986, a preliminary order was entered placing the child in emergency shelter care. On December 12, 1986, a preliminary hearing was held before Referee Frances Pitts, who authorized a petition as to Zinabe and continued the detention of the child **(T, 1721).**

On December 15, 1986, a dispositional hearing was held as to Mohammed Ali and Suehier. **(Pursuant to MCLA 712A.18)** Those children were continued in foster care. The

family was ordered to continue in family therapy and the child Mohammed Ali was to be in individual therapy. As to the child, Zinabe, the parents stipulated to wardship on that child and she was also placed in foster care. **(Order, 3/5/87; Petitioners' Appendix F)** Petitioners never appealed these findings and orders of the court, and they never sought a rehearing. **MCLA 600.861; MCLA 712A.21.**

On March 10, 1987, an order was entered transferring the case to the Presiding Judge's Docket (Judge Y. Gladys Barsamian). A statutory review hearing **(pursuant to MCLA 712A.19, since amended)** was scheduled for 5/7/87. **(Order, March 10, 1987.)**

Extensive testimony was taken at the statutory review hearing heard on May 7, 8, and 29, 1987, before Judge Barsamian.

At the close of the hearing, the judge noted that both the parents and therapists had been proceeding on the case as if the death of Samier were an accident. The judge stated that this was inappropriate because the court had previously found that the child had been killed. The court stated that one of the major impediments to return was the parents' insistence that the death was accidental **(Statutory Review; 5/29/87, 552-562).** The court therefore ordered that the parents be in therapy to deal with the non-accidental death of Samier Amer, that the children be continued in foster care and that visitation between the mother and Mohammed Ali

be suspended. **(Order, June 1, 1987; Petitioners' Appendix pp 151, 157.)**

On December 16, 1987, a petition was filed requesting that the parents' rights to all three children be terminated. **(Petition, 12/16/87)** The petition was filed pursuant to the old **MCLA 712A.19a.** This section has been substantially revised and is codified as **MCLA 712A.19b (effective April 1, 1989).**

The hearing on the permanent custody petition was held on 16 different days from May of 1988 to January, 1989. By agreement of the parties, the court heard the case both as a hearing on the permanent custody petition and on a statutory review hearing. The latter was done at the request of the parents, who argued that the Order of June 1, 1987, should be modified, specifically as to the parents' need to admit responsibility for the non-accidental death of the child Samier, and they asserted that more should be done to attempt to reunite the family **(T, 43-48).**

The petitioners' case, which was generally supported by the counsel for the child, was started at the hearing held on June 16, 1988. The case presented by the petitioners had a number of separate elements, each touched upon by some of the witnesses. Those elements were, first, that reasonable efforts had been made to reunite the family, but that these efforts were unsuccessful. The position of the Department was set out in the testimony of Kimberly Sanford, the petitioner

and foster care worker from DSS. When the children were initially placed in foster care, an agreement had been drawn up and signed by the parents, requiring them to work with the workers on planning for the children, visit the children regularly, be involved in counselling regarding grief over their son's death and for parenting-skills training and be supportive of the foster parent. **(Petitioners' Appendix K, Parent-Agency Agreement, 6/24/86; T, 924-926.)** When the children were made court wards in October, 1986, a new agreement was drawn up, requiring the parents to visit, go to Parent's Anonymous, and be in therapy regarding abuse in their home. The parents would not sign this plan due to the latter requirement **(T, 928-932; Respondent's Exhibit No. 5, Parent-Agency Agreement, January, 1987).**

Despite the parents' refusal to sign the treatment agreement, both sides continued to work on the other elements. The parents were provided with weekly visits with the children, conferences were arranged between the parents and the agency workers, referrals were made for counselling for the parents and to Parents Anonymous. In addition, therapy was provided for the oldest child and the children were placed in specialized foster care to give them extra attention **(T, 932-936).** Finally, efforts were made to arrange cultural and religious training for the children, by attempting to hire a Muslim Imman to work with the children. This plan was canceled by the Imman **(T, 1041-1042).** Ms. Sanford, as well as

the other workers on the case from Judson Center, noted that the parents cooperated with most of what was asked of them **(see Testimony of Elyse Fine, T, 372-473)**, but that the parents' failure to acknowledge responsibility for the abuse suffered by Samier was a continuing impediment to the return of the children. The workers explained that this was an essential first step because it went to why the children were in foster care. Other potential services were conditioned on progress in this area. **(T, 398, 562, 933, 975.)**

The reason why this particular issue was so important was that the history of the case had indicated that other approaches to therapy had not been successful, and in fact the child had been killed after earlier courses of therapy **(T, 411-414)**. Dr. Herman Schornstein testified that the fact that there was severe abuse here, that the severity of the abuse of the child Samier had escalated up to his being killed, and that the parents continued to deny direct responsibility for that abuse was convincing evidence that this was an untreatable family **(T, 441-444)**. A major determinant in whether the parents could achieve any success in treatment was whether the parents directly confronted their responsibility in the killing of the child **(T, 448, 462-463, 666)**. There was no evidence here that the parents had done this **(T, 612, 726)**.

The petitioners' case was also based upon the fact

that the parents, particularly the mother, had certain serious problems which had not been adequately resolved. The mother was described by clinicians from the Clinic for Child Study as having strong feelings of loss and rejection and having a psychological disposition to anxiety. These characteristics would cause serious problems in her interaction with the children, especially the child Mohammed Ali **(T, 599, 647-648, 710, 713-714).** The father was seen as unable or unwilling to recognize any problems that the mother might have and both he and the mother were so wrapped up in their own problems that they would be unable to do what was best for the children **(T, 666, 730-731).** Finally, both Julie Ribando and John Derr from the court's Clinic for Child Study testified that given that the parents had been in therapy for three years relating to the abuse of their children, it was unlikely that significant progress, warranting return of the children, would occur in the near future **(T, 649-660, 666, 730-731).**

Finally, both the petitioner and counsel for the children presented evidence that the child Mohammed Ali had been traumatized by the abuse suffered by his brother Samier. He was frightened of his mother because of what he felt she had done and sad and confused by the father's failure to give him more emotional support **(T, 647, 1202-1204, 1351-1353).** Given the child's own needs, including his progress in working out the death of his brother Samier, return to the parents would be harmful, both due to his experience and the fact that

the parents were not willing to work with him on the issue of the death of his brother **(T, 1324-1325)**.

The parents' case had four elements: First, that they had done all that had been asked of them by the agencies and the court, except expressly admit responsibility for the abuse of the child Samier Amer **(T, 977-981)**. The latter admission was not necessary because the parents had accepted responsibility for what had happened to their son and they had worked on the components of their abusive behavior; e.g., anger, self-esteem, marital stress **(T, 81-83)**.

Second, the parents argued that reasonable efforts had not been done to reunite the family and more could have been done to reunite the family. **(T, 1225-1227, 1250, 1258)**. The parents also proposed that a program of "strategic family therapy" be instituted along with a program of incremental visits **(T, 1530, 1600-1601)**. The parents also presented testimony that the whole family should be evaluated together before any definitive decision could be made **(T, 15365-1538)**.

Third, the parents presented evidence that they were emotionally healthy individuals who could provide a healthy and nurturing environment for their children **(T, 88-90, 1502, 1511)**.

Finally, it was the parents' contention that any emotional problems evidence by the children, in particular Mohammed Ali, were due to the influence of his foster mother,

who had misled him regarding the circumstances of his brother's death and turned him against his parents (T, 1449-1502, 1511).

At the close of proofs, the court made extensive findings of fact and law. The judge first enumerated all the important elements of the almost four-year legal history of the family's involvement with the court (T, 1714-1725). The history of the case was significant to the court because of, first, the circumstances of the initial wardship of the child Samier Amer. Once the child had been placed in foster care, the parents were very cooperative with the workers and the workers on the case. However, the parents failed to acknowledge how the injuries had occurred. Despite this the child had been returned to the parents, precisely because they had been cooperative. It was soon after this that the child was killed while in the care of the parents (T, 1725-1728).

After the adjudication on the surviving children, the parents were again very cooperative in the treatment plan, except again as to acknowledging responsibility for the killing of their child. The court found that this issue was central to a determination in the case. In doing so, it rejected appellant's argument that the parents could "experientially" accept responsibility for the death of the child, because that approach had been tried and had failed (T, 1729-1730). The court noted that until it was known how and why the child had died, there was no assurance that what the

parents were working on in therapy would provide a safe home for the children **(T, 1731).**

The court specifically found that efforts had been made to reunite the family by a number of people, but that all of those efforts had been unsuccessful. The court also found that the problems that existed with the family initially continued to exist three and a half years later and that there was nc likelihood that they would change in the foreseeable future. The court therefore found that there was clear and convincing evidence to terminate the parents' rights, pursuant to **MCLA 712A.19a(e)** and **(f).** The court then found that termination of the parents' rights was also in the best interests of the children, given that their continuation in foster care would be more harmful to them than termination **(T, 1732-1734).** The children were therefore committed to Michigan Children's Institute for adoption planning and the parents' rights were terminated. **(See, Petitioners' Appendix B and C.)**

Petitioners did <u>not</u> file a petition for rehearing after the court's termination order. Pursuant to **MCLA 712A.21** that petition could have challenged **"...all the matters coming within the provisions of this chapter... ."** Presumably including factual issues.

On June 12, 1990, the Michigan Court of Appeals affirmed the decision of the Wayne County Juvenile Court. In their appeal of right to the Court of Appeals, Petitioners never challenged any element of the Juvenile Court's original

assumption of jurisdiction over the children. Such a collateral attack on the original adjudicative hearing is allowed as a matter of case law in Michigan. **Matter of Ferris, 151 Mich App 736 (1986); In the Matter of Adrianson, 105 Mich App 300 (1981).**

In its decision the Court of Appeals discussed, at great length the history and testimony presented in the trial court. The respondent children adopt, by reference the court's recitation of the facts as supplementing the statement of the case herein. In deciding the case the court held that the trial court's decision terminating petitioners' parental rights was supported by clear and convincing evidence and was not clearly erroneous. The court rejected petitioners' due process argument that the burden had been impermissibly shifted and it rejected a due process challenge to the statutory scheme in effect at the time of the trial. The court declined to specifically address petitioners' fifth amendment argument and it held that there was no violation of state and federal law relating to reasonable efforts. The issue of the different standards of proof at the original adjudication and the subsequent permanent termination hearing was not presented by petitioners on appeal and was not addressed by the appellate court. **(See, Petitioners' Appendix A.)**

At the date of this writing, the minor children have been continuously in foster care for four and five years,

respectively. Pursuant to Michigan law, they were legally available for adoption at the point when the state court appeals were exhausted. **See, MCLA 710.56(2).** It is unclear to counsel what legal effect these proceedings may have on the adoption process.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Petitioners' Burden Of Proof Argument Was Never Raised In Any Of The Proceedings In The State Court, Nor Was It Addressed By The Michigan Court of Appeals. Further, That Argument Is Without Legal Merit Or Support.

Petitioners' first question presented, relating to an alleged violation of due process resulting from the different burdens of proof at the original adjudication hearing and the permanent termination haring, was never raised by petitioners in the state court trial or on appeal. Nor was the issue addressed by the Michigan Court of Appeals. First, the Michigan appellate court's, as a matter of state procedure, do not generally address issues not properly raised in the trial court. See, **Ledbetter v Brown City Bank, 141 Mich App 692 (1985); In the Matter of Amer, Mich Ct of Apps, Docket No. 114910, Petitioners' Appendix A.** Generally speaking, a petitioner's failure to follow state procedures for raising a federal question will preclude review by this court. See, **Ferguson v Georgia, 365 US 570 (1961); In re Lamkin, 355 US 59 (1957).** Second, the question was never presented to the Michigan appellate courts, nor was it decided on appeal. The decision of the Michigan Court of Appeals accurately catalogues and discusses the issues raised by petitioners in their appeal below. The burden of proof question was not one of them. **(See, Petitioners' Appendix A, pp 12-15.)** This court will not decide federal constitutional questions raised for the first time in this court where it

reviews state court decisions. **Cardinale** v **Louisiana**, **394 US 437 (1969).** Petitioners' first question is therefore not properly justiciable by this court.

Assuming arguendo that this question is properly preserved for argument by this court, the question is not one that merits consideration by this court and petitioner has not demonstrated that any error occurred in the case at bar.

Under Michigan law the standard of proof required at the "trial" or adjudication stage is the preponderance of the evidence standard. **MCR 5.972(c)(1).** The trial is defined in **MCR 5.903(A)(19)** as **"...the fact finding adjudication of a case on a charge contained in an authorized petition to determine if the minor comes within the jurisdiction of the court."** Termination of parental rights can only occur after the court has assumed jurisdiction over a child and where the parents have received proper notice of the request for termination. **MCR 5.974(A).** Termination of parental rights is a dispositional question separate from the court's assumption of jurisdiction. **MCLA 712A.20.** The standard of proof in parental rights termination hearings in Michigan is clear and convincing evidence. **MCR 5.974;** see, **Santosky** v **Kramer**, **455 US 745 (1982).** The issues in the termination hearing is whether a statutory basis for termination has been established and whether that termination is in the best interest of the child. **MCR 5.974(A)(2).** The statutory basis for termination at the time of the proceedings below was set out in **MCLA**

712A.19A(a) - (f). That statute has since been significantly changed by the new **MCLA 712A.19b (Effective 4/1/89.)**

The statutory scheme in Michigan is similar to that in most states. Most states require the moving agency to establish the grounds for jurisdiction by a preponderance of the evidence, and all states mandate clear and convincing evidence for termination of parental rights. See, **e.g., Ark. Stat Ann § 355 (West Supp 1990); Colo Rev Stat § 19-3-505(1) (supp 1990); D.C. Code Ann § 16-2317(b)(2); Fla Stat Ann § 39-408(2)(b); KY Revd Stat Ann § 620.100(3); Maine Revd Stat Ann, Tif. 22 § 4035.2; MD Cts & Jud Proc. Code § 3-819(d) (1989); Miss Code Ann § 43-21-561(3) (1981); N.H. Revd Stat 169-C:13 (1990); N. J. Stat Ann § 9:6-8.46b (supp 1990); N.Y. Fam Ct Act § 1046(b) (1983); Ore Rev Stat § 419.500 (1989); Texas Fam Code § 11.15(a) (Vernon Supp 1989);** see also, **Santosky** v **Kramer, supra.**

The application of the preponderance standard at the original adjudication meets constitutional muster. Applying the due process analysis set out in **Matthews** v **Eldridge, 424 US 319 (1976),** and **Santosky** v **Kramer, supra** one must first look at the private interests affected by the proceeding. At the adjudication the interests of the parent is not nearly as great because the issue is not permanent loss of parental rights, but rather only whether the court will assume jurisdiction over the child. **MCR 5.903(A)(19).** Even if the court does take jurisdiction, the case still may be warned and

dismissed, the child may be placed in the parent's home under court supervision or the child may be temporarily placed in a foster home or an institutional setting.

MCLA 712A.18(i)(a) - (e). Also at stake in such proceedings are the child's independent right to safety and well-being. This interest is comparable to that of the parents. See, **In the Matter of Tammie Z., 66 NY 2d 1; 484 NE2d 1038 (1985); Comment, "Dependency Proceedings: What Standard of Proof"?, 14 San Diego L Rev 1155 (1977).**

Second, and most importantly is that the risk of error can fall more heavily on the child in the adjudicatory stage. While in the termination of parental rights case the likely consequence of an erroneous failure to terminate is the preservation of an uneasy status quo, **Santosky v Kramer, supra at 765-766,** the erroneous denial of jurisdiction could mean that the child would be returned to a neglectful or abusive home. **In the Matter of Tammie Z., supra.** The consequences of returning a child to such a home, especially without any court supervision, could very well be grave and even life-threatening. See, **Comment, "Dependency Proceedings: What Standard of Proof"?, supra at 1168, fn 71-74.** Moreover, the evidentiary problems are particularly great at the adjudicatory stage. Most abuse and neglect by it's very nature occurs in the home, where the parents are presumably in charge. The only witnesses may very often be young children who could be fearful of further maltreatment if they "told" or

migt be too immature to testify. In many ways the parents are in a much more advantageous evidentiary position at the adjudicatory stage than either the state or the children. See, **Comment, What Standard of Proof at Dependency Proceedings?, supra.**

Finally, the government's parens patriae interests includes its interest in protecting the physical safety and well-being of children. See, **Stanley v Illinois, 405 US 645 (1972).** The state also has an interest in assuring that families that evidence problems receive some attention to remedy them in an effort to preserve families. See, **In the Matter of Tammie Z., supra;** see also, **42 USC 671 et seq.** These interests are best served by the preponderance standard. Moreover, the fact that most states apply this standard is strong evidence that the legislative judgment is consistent with the traditions of our people and our law, and that it is entitled to a powerful presumption of validity. **Riviera v Minnich, 483 US 574 (1987).**

The standards of proof applied by the trial court were therefore constitutionally proper and do not merit further review by this court.

2. There Was No Impermissible Shift Of The Burden Of Proof Where The Trial Court Had Previously Found That The Parents Were Responsible For the Non-Accidental Death Of One Of Their Children, They Were Required To Assume Responsibility For the Death And The Children Were In Foster Care For More Than Two Years Pursuant To Continuing Court Orders.

Petitioners' burden shifting argument was effectively answered by the Michigan Court of Appeals in its decision below. See, **Petititioners' Appendix A, p 14.** In its decision the appellate court properly drew a distinction between the burden of proof placed on the party seeking to terminate parental rights and the burden of going forward, which can properly be placed on the parents. Where, as here, the parents produce some evidence that the family situation has improved, they have met their burden of production. The burden of proof remains on the moving party. See, **In re Miller, 433 Mich 331 (1989).** However, simply meeting the burden of production does not mean that the parents should necessarily prevail. **In re Miller, supra at 345.**

Moreover, the trial court did not adhere to any irrebutable presumptions. The first alleged presumption had to do with the legal effect of the death of the child Samier; appellants frame it as the death of the minor child from a head injury, which was not adequately explained by the parents, would establish their unfitness to care for their children. By framing the issue in this way, petitioners misstate the facts here, which were that the death of the child was non-accidental and that one of the parents was responsible for that death. These facts established that the parents abused and neglected their children. **(Adjudication, 10-28-86, 382, 392.)** Such findings can reasonably be

considered to be a determination that the parents home was unfit. See, **In re Futch, 144 Mich App 163 (1983).**

When the case went to hearing on the permanent custody petition, the issue was not whether the death of the child established the parents' continuing lack of fitness, but rather whether the efforts made to rehabilitate the family had been sufficiently successful to render the home safe for the return of the children **(T. 1731-7132).** A distinction must be drawn between the proper presumption of unfitness which was established at the original adjudication and the process of proofs at the permanent custody hearing. The conclusion that the unexplained, non-accidental death of a child in the parents' care shows parental unfitness is quite similar to the presumption that the United States Supreme Court approved in **United States v Gainey, 380 US 63; 13 L Ed 2d 658; 85 SCt 754 (1965).** That statutory presumption met the court's rational connection standard. Similarly, a finding of parental unfitness, in a home where a child is killed, bears a rational connection.

The burden in the instant case was clearly on the State to show that the parents had failed to remedy the problems which caused their children to come into foster care. What appellant has confused here is the behavioral burden on the parents to achieve some meaningful change in their practices and abilities as parents and the State's legal burden of proof that the parents had not changed and that

their problems continued unabated. That burden never shifted here.

Similarly, appellants' second alleged presumption was in fact an issue which was subject to the full proofs presented by the prosecution **(T. 413-414; 424-426; 720-721; 938-939).** The fact that appellants were not able to prevail on this issue at the hearing below does not mean that the court simply presumed that a failure to admit responsibility meant that the parents home was unfit. Instead, the court considered the history of other therapeutic approaches and their failure to protect the children and concluded that the problems which brought the family to the attention of the court had not been resolved **(T. 1729-1732).** Finally, the record refutes any assertion that nothing was done to work with the family until they "confessed to a crime." **(See, Petitioners' Appendix A; Appendix B pp 29-42.)** In fact, at no time were the parents made to "confess to a crime." See, **infra**.

Finally, petitioners' argument no longer has any relevance to the present statutory scheme. The termination of parental rights provisions of the Michigan Juvenile Code were substantially amended in April, 1989. Those changes eliminate any question as to where the burden of proof lies and also make clear that there are no irrebutable presumptions in the

statute.[2] See, MCLA 712A.19b(3)(b) and 19b(3)(c). It is therefore apparent that petitioners' argument is at best an issue important only to the parties and not to the public. As such it is not justiciable by this court. Rice v Sioux City Cemetary, 349 US 70 (1955); Layne J Bowler Court v Western Well Works, 261 US 387 (1923).

3. Petitioners' Right To Remain Silent Was Not Violated Where They Were Required To Accept Responsibility For The Non-Accidental Death Of Their Child In A Civil Proceeding Seeking Termination Of Parental Rights.

Petitioners' fifth amendment argument was not properly raised in the state trial court and is therefore not justiciable by this court because there is a non-federal ground adequate to support it, namely the lack of a timely objection. Ferguson v Georgia, 365 US 570 (1961); In re Lamkin, 355 US 59 (1957); see, Ledbetter v Brown City Bank, 141 Mich App 692 (1985).

Assuming arguendo that the question is justiciable

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Petitioner raises a facial attack on the constitutionality of the old statutory scheme in the body of his argument. However, this issue was not presented in petitioners' Questions Presented for Review and is not properly before this court. See, Sup Ct Rule 14.1 (1990 Revised). Even assuming arguendo that the question is properly presented, it is not an issue meriting consideration by this court because it is a challenge to a statute which is no longer in effect. See, Rice v Sioux City Cemetary, 349 US 70 (1955); Children's Argument, infra. Finally, the Michigan Court of Appeals has properly rejected such constitutional challenges on a number of occasions. See, In re Martin, 167 Mich App 715 (1988); In re Gentry, 142 Mich App 701 (1985); Michigan Court of Appeals Decision, In re Amer, Petitioners' Exhibit A.

by this court, petitioners' contention that their rights against self-incrimination and due process were violated, flies in the face of the factual and legal circumstances of this case. Their rights against self-incrimination were simply not implicated here. What they are essentially left with is an argument that they differ with the trial court's position that an admission of responsibility for the death of their son was an essential treatment goal. This is not an issue that rises to constitutional magnitude, but rather was a proper and well-reasoned exercise of the trial court's discretion.

During the three years that this case was pending before the Juvenile Court, the parents testified voluntarily at every stage. Both parents testified extensively at the adjudicatory hearing in 1986. **(Adjudication, 200-224; 272-284; 295-308; 312-357.)** Both testified in their own behalf at the statutory review hearing held in 1987. **(Statutory Review, 352-365; 401-409.)** Both also testified at the hearings on the permanent custody petition. **(T. 12/14/88, 4-176; 1375-1488.)** At no time during the case in Juvenile Court was either parent compelled by the State to testify.

The self-incrimination privilege of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment...,

> **...not only protects the individual against being involuntarily called as a witness against himself in a**

> **criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. Lefkowitz v Turley, 414 US 70, 77, 94 SCt 316, 322, 38 L Ed 2d 274 (1973).**
>
> **See, In re Stricklin, 148 Mich App 659 (1986).**

However, even in a criminal proceeding, once a defendant testifies, she waives her Fifth Amendment rights. **Brown v United States, 356 US 148 (1958); People v Johnson, 382 Mich 632 (1969); cert den 397 US 1079; People v Guy, 121 Mich App 592 (1982).**

Although the right does apply in civil cases, like that at bar, it is much more limited. Generally, adverse inferences can be drawn against a party who does not testify. **In re Ryan M., 513 A2d 837 (Me, 1986); see, Barker v Palmigiano, 425 US 308; 96 SCt 1551; 47 L Ed 2d 810 (1976).**

Thus petitioners' rights against self-incrimination were not implicated here, both because they were never compelled to testify and their statements could not incriminate them in later criminal proceedings. This was true because, as appellant so aptly argues, the mother had been acquitted of criminal charges, arising out of the death of her son, before the juvenile court case came to adjudication in 1986. Retrial of the mother on charges arising out of that incident was barred by the principles of double jeopardy.

Sanabria v United States, 437 Us 54 (1978); see, People v Anderson, 409 Mich 474 (1980); cert den 449 US 1101.

In fact, the procedures followed here had the result of protecting petitioners' Fifth Amendment rights because all of the proceedings were held after the trial on the criminal charges. **(Petitioners' Appendix B, pp 24-25; Appendix N, p 151.)** This had the effect of providing petitioners with absolute immunity from prosecution. See, **Patton, "The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings", 24 Georgia L Rev 473, 501-502, 516-523 (1990) (hereinafter cited as Patton).** Petitioners' were therefore free from any coercive circumstance which could have implicated their right to remain silent. See, **Baltimore City Department of Social Services v Bouknight, 493 US ____; 107 L Ed 2d 992; 110 SCt 900 (1990).**

Absent any Fifth Amendment privilege, petitioners seem to try to elevate their denial of responsibility to a matter protected by due process. This assertion is made without any authority. See, **In re Futch, 144 Mich App 163 (1984).** Moreover, it challenges, without basis, the trial court's exercise of discretion in supervising the wardship of these children. The juvenile court's decision in May, 1987, to order the parents to deal with and accept responsibility for the non-accidental death of their son was made only after extensive testimony at the May, 1987, statutory review

hearing. That order was never appealed. Moreover, it was a reasonable approach to the case, given the facts before the court. What the parents are actually complaining about to this court is that the juvenile court did not believe their explanations of what happened to their son. But the court was under no obligation to do so. Nor did the court have to agree with the parents that their denial of direct responsibility for the death of their son was not an impediment to effective treatment. The court reasonably found otherwise.

The Minnesota Supreme Court, in the case of **Matter of J.W. and A.W.**, 415 NW 2d 879 (Minn, 1987), discussed the impact of a parent's failure to admit responsibility for abuse of a child in the context of the Fifth Amendment:

> It is equally clear the privilege does not prohibit the state from initiating further measures for the safety and well-being of the children. The parents cannot enjoin the state from seeking court orders keeping the children in foster care, or, if the situation should require, from seeking termination of parental rights. What the parents would like to claim, although of course they cannot, is that their responsibility for the death of a child and the inferences arising therefrom is privileged and may not be considered in determining their suitability as parents. But to state this proposition is to refute it. Not only does the proposition ignore the fact that the evidence of responsibility has already been received but it

ignores the best interests of children.

*** *** *** *** *** *** *** *** ***

The parents, of course, are free to show they have changed their abusive and violent ways and can be good parents, so that the family may be reunited. But, says the trial court, "It is well settled that an explanation and recognition of the cause of the child's death is necessary before any meaningful change can occur to correct the behavior that lead [sic] to the abuse of [the nephew]." The parents may disprove the trial court's assumption, if they can, -- and on this record, it is only an assumption -- but it would seem a difficult task to engage in any effective therapy without confronting honestly one's own inadequacies in discussions with the psychologist. All we can say is that it remains to be seen whether a less than candid therapy will suffice to make appellants good parents. Admittedly, the parents are confronted with a dilemma, but it is not a dilemma that triggers the Fifth Amendment to the extent the parents would wish. In the lexicon of the Fifth Amendment, the risk of losing the children for failure to undergo meaningful therapy is neither a "threat" nor a "penalty" imposed by the state. It is simply a consequence of the reality that it is unsafe for children to be with parents who are abusive and violent.

Supra at 883-884 (footnotes omitted). See, In re Jessica B., 254 Cal Rptr 883 (Cal App 5 Dist, 1989); Dutchess County

DSS v Mr. G., 141 Misc 2d 641;
534 NYS 2d 64 (Fam Ct, 1988)

Moreover, a vast majority of the courts that have been presented with this and similar issues have held that the refusal to admit abuse has been a persuasive factor against the return of children and in favor of termination of parents rights: State v Tunell, 51 Wash. App. 274, 753 P.2d 543 (1988); Dymenstein v State, 720 P.2d 42 (Alaska App. 1986); Matter of Welfare of V.H., 412 N.W.2d 389 (Minn. App. 1987); People v Draper, 150 Mich App 481, 389 N.W.2d 89 (1986); In Interest of K.L.C., 372 N.W.2d 223 (Iowa 1985); In Re Interest of V.B., 220 Neb. 369, 370 N.W.2d 119 (1985); In Interest of Two Children, 477 So.2d 883, 888 (La. App.1 4 Cir. 1985); In re Juvenile Appeal (84-AB), 192 Conn. 254, 471 A.2d 1380 (1984); Matter of Welfare B.C., 356 N.W.2d 328, 331 (Minn. App 1984); In the Interest of TDH, 344 N.W.2d 268, 270 (Iowa 1983); In re Interest of Brungardt, 211 Neb. 519, 319 N.W.2d 109, 115 (1982); Long v Long, 255 N.W.2d 140, 145 (Iowa 1977); In Interest of R.W.B., 241 N.W.2d 546, 557 (N.D. 1976); cf Matter of Adoption of Embick, 351 Pa. Super. 491, 506 A.2d 455, 468-471 (1986).

Similarly, many courts have held that an acknowledgment of guilt is a critical first step towards rehabilitation. United States v Hall, 792 F2d 941 (CA 9, 1986); United States v Floyd, 496 F2d 982 (CA 2, 1974), cert den 419 US 1069 (1974). Petitioners, in contrast, cite no

cases supporting their position. Their argument does not merit review by this court. See, Rice v Sioux City Cemetary, 349 US 701 (1955).

4. Review Of Factual Determinations Of The State Trial And Appellate Courts Is Not A Matter Properly Reviewed By This Court And There Was Sufficient Evidence Presented In The Trial Court To Support Termination Of The Parents Rights.

While petititioners appear to present a challenge to the sufficiency of the evidence presented at trial **(see, Petitioners' Questions Presented I, B)**, this question is not directly addressed in petitioners' arguments for allowance of the writ. This error should preclude review by this court of this question. See, **Sup Ct Rules 14.1(j)** and **14.3.** Even assuming that the issue is properly before the court as a matter of procedure, there is no reason for this court to review the factual determinations of the state courts. See, NLRB v Hendricks County Rural Electric Corp., 454 US 170 (1981); Texas v Mead, 465 US 1041 (1984) (Stevens, J.) This court, as a court of law rather than a court for the correction of errors in fact finding, does not undertake to review concurrent findings of fact by the lower courts in the absence of a very obvious and exceptional demonstration of error. Branti v Finkel, 445 US 507 (1980); Graver Mfg. Co. v Linde Co., 336 US 271 (1949). There was no such error here. See, In the Matter of Amer, Mich Ct Apps Docket No. 114910, Petitioner's Appendix A.

Moreover, there was clear and convincing evidence to support the termination of petitioners' parental rights. The Michigan Court of Appeals, in the state court decision below, discussed the evidence in great detail and found that it properly supported termination of parental rights. Petitioners offer no convincing reason why this decision should be set aside, nor do they offer any reason why this question is a matter of importance to anyone other than the parties. See, **Layne & Bowler Corp. v Western Well Works, supra.**

Finally, this court has properly demonstrated a policy of great restraint against involving itself in cases of child welfare. See, **Lehman v Lycoming County Children's Services Agency, 458 US 502 (1982); Moore v Sims, 442 US 415 (1979).** This policy should rightfully apply to the factual review of permanent termination cases. The writ should not be granted as to this question.

5. Appropriate Services Were Provided To Petitioners By The Michigan Department Of Social Services And Its Agents And There Was No Violation Of Federal Law, Relating To Foster Care, Which Could Merit Review By This Court.

Petitioners' bold assertion that no efforts were made to reunite this family, in violation of the requirements of **42 USC § 671 et seq (Adoption Assistance and Child Welfare Act of 1980)** is without merit or factual support. As with much of petitioners' Petition for Certiorari, this argument asks this court to review factual determinations of the courts

below and to unnecessarily inject itself into state child welfare proceedings. This court has properly chosen to do neither and petitioners offer no reason why they should change those policies. See, **NLRB v Hendricks County Rural Electric Corp., supra; Lehman v Lycoming County Children's Services, supra.**

Second, both the trial court and state appellate court found that reasonable efforts were made to reunite the family. See, **In the Matter of Amer, Mich Ct of Apps, Docket No. 114910, Petitioners' Appendix A; Opinion of Judge Barsamian, 1/9/89, Petitioners' Appendix B.**

Prior to the time that these children were removed from their parents' home, the parents were involved with the Juvenile Court based upon the court's jurisdiction over the child, Samier Amer. The court provided in-home supervision of the instant children, liberal visitation with the child, Samier, referrals for parenting classes and therapy with an ethnically congruent therapist. Despite these services, the child, Samier Amer, was killed while in the care of the parents. **(T. 921)** The Juvenile Court therefore ordered that the surviving children be removed from the parents' home to assure their safety. **(T. 1717)**

During the time that the children were in foster care, the parents were provided with regular weekly visitations with the children, weekly meetings with the social workers, and quarterly conferences with all parties to discuss

progress and problems in the case. The parents were referred to Parents Anonymous and to a therapist for psychological counseling. The children were provided with intensive supervision in the foster home and the oldest child was provided with individual therapy. **T. 933)** These efforts to both prevent removal and reunite the family were both reasonable and appropriate under the circumstances of this case. See, **National Council of Juvenile and Family Court Judges, etal., Making Reasonable Efforts: Steps for Keeping Families Together, pp 66-69, 72-73; 42 USC 671 et seq; Dutchess County DSS v Mr. G., supra; Matter of Nathaniel T., 501 NYS 2d 647; 492 NE 2d 775 (1986).**

It should be emphasized that other efforts to reunite the family were envisioned if and when the parents had accomplished the primary goal of acknowledging responsibility for the death of their son. This was seen as an essential first step by the workers. **(T. 495-496; 562)** The decision to adopt this approach was well within the discretion of the agencies and the court. The fact that the agencies did not adopt the approach advocated by the parents does not mean that reasonable efforts were not made. See, **In re Springer, 172 Mich App 466 (1988); see generally Shotton, A., "Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later, 26 Cal Western L. Rev 223 (1990).**

In addition to providing services to the family, the agencies prepared periodic case plans (called "updated service

plans" here) as required by **42 USC 675. (T. 353-356; 360, 364, 371, 391, 532-544)** In addition, a six-month status review hearing was conducted by the court, as required by **42 USC 675(5)(B)** (the May statutory review) and the bifurcated review/permanent custody hearing met the requirements of **42 USC 675(5)(C).** All the requirements of federal law were therefore met.

6. Petitioners' Application For The Writ Of Certiorari Should Be Denied Because Further Proceedings In This Case Would Not Be In The Best Interests Of The Children.

The minor children Mohammed Amer and Suehier Amer were placed outside of their parents' home on November 22, 1985, pursuant to an emergency placement order. **(T. 1717-1718)** The child, Zinabe Amer, was born on 12/9/86, and was ordered into emergency foster care the next day. **(T. 1721)** All three children have remained in foster care since those dates, periods of more than 5 and 4 years respectively. Pursuant to **MCLA 712:56(2)** the children were legally eligible for adoption on June 12, 1990, when the Michigan Court of Appeals affirmed the decision and order of the Juvenile Court. All three children are now together in a pre-adoptive home, awaiting a finalization of their adoption.

The practical effect of this court granting petitioners' writ of certiorari would be to bring further delay and uncertainty into the lives of these children. Both generally speaking and specifically as to these children, a delay of another 6 to 9 months to allow this court to decide

this case on the merits would not be in their best interests.[3]

In Michigan, as in many other states, the courts are mandated to consider the best interests of the child once grounds for permanent custody have been established. In re Schejbal, 131 Mich App 833 (1984); MCR 5.974(F)(3); also see, In re Micah S., 198 Cal App 3d 557; 243 Cal Rptr 756 (Cal App 6 Dist. 1988), In re Interest of CDC, 455 NW2d 801 (Neb 1990); Dutchess County DSS v Mr. G., 141 Misc.2d 641; 534 NYS 2d 64 (Fam Ct 1988). Similarly, this court has noted that the State's interest in finding a permanent home arises when it is clear that the natural parent cannot or will not provide a suitable home for the child. Santosky v Kramer, 455 US 745 (1982).

The child's need for permanency and the State's interest in finality has been recognized by this court, in Lehman v Lycoming County Children's Services, supra at 513-514 (footnote omitted):

---

3 In fact, given that the children could be adopted at any time during the pendency of this case before this court, the questions may very well be moot before this court can decide this case. It must be noted that petitioners have not requested a stay in this case. See, Sup Ct Rule 23 (1990). The court is therefore presented with a situation where it is being asked to intercede in matters normally and reasonably left to the states, (decisions on child custody), in a manner that can only lead to further confusion in this and other cases. This contradicts the intent and substance of prior decisions of this court and federal law. See, Lehman v Lycoming County Children's Services, 458 US 502 (1982); 42 USC 671 et seq.

> **The State's interest in finality is unusually strong in child-custody disputes. The grant of federal habeas would prolong uncertainty for children such as the Lehman sons, possibly lessening their chances of adoption. It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current "home," under the care of his parents or foster parents, especially when such uncertainty is prolonged. Extended uncertainty would be inevitable in many cases if federal courts had jurisdiction to relitigate state custody decisions.**
>
> **See, Sylvander v New England Home For Little Wanderers, 584 F2d 1103 (CA 1, 1978).**

One of the most common impediments to permanency for children is the delay attendant to an appeal, such delays are clearly not in the best interests of the children. **In re Micah S., supra; Coleman, Hon. Mary S., et. al., Coleman Commission Report on Permanency Planning, pp 11, 33.**

In the case of **In re Micah S., supra at 762,** Judge Brauer of the California Court of Appeals discussed the reasoning underlying a best interst analysis (relying on **Goldstein, Freud and Solnit, Beyond the Best Interests of the Child, (The Free Press, 1979):**

The state should not lightly intrude into the relationship between parent and child. But once neglect, abandonment or abuse had dictated removal, the separation of a child from a parent has devastating emotional consequences so as to make imperative an early new bonding with a person or persons who fulfill a child's psychological needs for stability, interaction, companionship, interplay and mutuality. Foster placement, being temporary, does not do the trick because it warns the adults against any deep emotional involvement with the child. Even adoptive parents may hesitate to make a full commitment to the child as long as the placement is not irrevocable. The absence of a psychological parent must reflect the child's, not the adult's, sense of time. Perhaps the most poignant as well as most frequently quoted passage is: "Three months may not be a long time for an adult decisionmaker. For a young child it may be forever." On the basis of their investigations and professional judgment the authors conclude that the "...maximum intervals beyond which it would be unreasonable to presume that a child's residual ties with his absent parents are more significant than those that have developed between him and his longtime caretakers [are]: (a) 12 months for a child up to the age of 3 years at the time of placement; (b) 24 months for a child from the age of 3 years at the time of placement." (footnote omitted)

This case has lingered on for 5 1/2 years, both the state trial court and the appellate court have found that there was sufficient evidence and grounds to terminate petitioners' parental rights. Once that has been established the interests of the children must be considered paramount. Any further delay in this case would not be in the children's best interests. —The writ should be denied.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted:

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Dated: March 13, 1991.

Supreme Court, U.S.
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NO. 90-1282

(4)

SUPREME COURT OF THE UNITED STATES
October 1990 Term

REHAB AMER and AHMED AMER,

Petitioners

v.

DEPARTMENT OF SOCIAL SERVICES,

Respondent

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

Page

THIS COURT HAS JURISDICTION TO DECIDE ALL THE FEDERAL QUESTIONS RAISED HEREIN INASMUCH AS PETITIONERS RAISED THE VERY SAME QUESTIONS IN THE PETITION FOR CERTIORARI THAT THE COURT OF APPEALS CONSIDERED AND EXPLICITLY REJECTED.....1

TABLE OF AUTHORITIES

Page

Caldwell v. Mississippi, 472 U.S. 320, 326-328 (1984). 8

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928): 7

Orr v. Orr, 440 U.S. 268, 274-75 (1979); 7

Santoskey v. Kramer, 455 US 745; 102 S Ct. 1388; 71 L Ed 2d 599 (1982).....4, 6

Fourteenth Amendment.....4

See in general, Stern, Gressman, Shapiro, Supreme Court Practice, Sec. 3.22.....8

REPLY OF PETITIONER

Counsel for Respondent Children, William E. Ladd, but not the Attorney General, challenges the jurisdiction of this Court at page (1) of his Brief by stating:

" First, petitioner's question relating to the two different burdens of proof applied at the various stages of the juvenile court proceedings (Petitioner's Question I, 1) was never presented by petitioners in the state court, either at the trial court or appellate level. Further the issue was not addressed by the Michigan Court of Appeals in its decision below."

This statement misleads this Court. All the constitutional issues raised in the Petition for Certiorari were raised not once, but not less than four times before the appellate courts of Michigan. The Petitioners' Court of Appeals Brief below at page 7,10,14,25,28, 33 and 35-38, raised the Due Process and findings

questions (see Petition for Certiorari "Question I.1."), and, at pages 38-40 the coerced confession issue ("Question I.2.") The Petition before this Court is essentially the same as the brief filed before the Court of Appeals. For example, Petitioners' Michigan Court of Appeals Brief stated:

> "After referring to the first placement of Samier in foster care in 1984 (T 1/19/89 at 12-13), Judge Barsamian alluded to the preliminary hearing conducted by Probate Judge Martin Maher which had concluded in 1986, almost a year after Samier's death. She stated that Judge Maher had determined "that Samier Amer was killed." (T 1/9/89 at 14).
>
> "Although Judge Barsamian refers to Judge Maher's finding during the adjudicatory phase, she does not herself provide specific evidentiary support for her conclusion that the Amers "killed" Samier. (T 1/9/89 p. 14)." (Court of Appeals Brief, Page 7)
>
> "In summary, Judge Barsamian's decision relied on Judge Maher's finding made at the adjudication preliminary phase of this proceeding. She also emphasized that the Amers refused to confess to a killing which she intuitively knew had been intentionally perpetrated by one or the

other. She presumed that a confession of guilt is absolutely indispensable for the safety of the children should they be returned, and she assumed that anything else indicating the Amers are capable parents, psychologically sound, love their children, have exhibited extraordinary dedication and are fighting for their lives is inconsequential. She apparently assumed that proper efforts were made to reunite this family. She assumed that the best interest of these children would be served by severing their ties to their parents and to their heritage.

During the termination hearing, Judge Barsamian would allow no testimony about discrimination against the Amers because of their ethnic background (a-38); would not listen to or admit into evidence tapes of the interaction between the Amers and their children; she would not talk to the children (T 12/15/88 1443-1445) would not allow questions about alienation of the children from their parents (T 12/16/88 at 1519-1523); refused to order neutral conjoint evaluation as requested by motion (a-37); would not allow any testimony about the competency of the Clinic for Child Study report of 1988 (T 12/16/88 at 1540-1542); and would not let the Amers' expert Dr. Gordon Blush, a psychologist with extensive experience, (T 6/6/88 Exhibit Two) to testify about the psychological effect of permanent parental termination upon the emotional well being of the children. (T 12/16/88 at 1533-1534)

Most importantly, when counsel for the Amers attempted to question Ahmed Amer about the death of Samier, the Court said:

"I agree with Mr. Ladd on the whole in terms of the matter has been adjudicated, findings of fact have been made." (T 12/15/88 at 1376).

Judge Barsamian did not articulate or recognize a distinction between the jurisdictional hearing, the statutory hearing, or the termination hearing with respect to statutory criteria or burdens of proof.
(Court of Appeals Brief, Page 10)

The Probate Court did not distinguish between a preliminary hearing and one for termination. "A distinction exists between evidence which would support an order of temporary custody by reason of neglect and evidence necessary to support a permanent custody order. Fritts, supra, at 113....
(Court of Appeals Brief, Page 33)

ARGUMENT IV

IF THE FINDINGS AND EVIDENCE BELOW ARE SUFFICIENT UNDER MICHIGAN LAW TO WARRANT PERMANENT TERMINATION, THEN THE ORDER OF TERMINATION AND SECTION 19(e) AND (f) ARE IN VIOLATION OF DUE PROCESS OF LAW UNDER THE CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV AND THE MICHIGAN CONSTITUTION,

ARTICLE 1, SECTION 17.
(Court of Appeals Brief,
Page 35)

In Santoskey v. Kramer, 455 US 745; 102 S Ct. 1388; 71 L Ed 2d 599 (1982), the United States Supreme Court held that: "Before a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the state support its allegations by at least clear and convincing evidence." 102 S Ct. at 1391-92. This result flowed from the "Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." Id at 1394."
(Court of Appeals Brief, Page 35-36)

Furthermore the Court of Appeals Brief of the Respondent Attorney General addressed the findings issue as follows:

"In the instant case, the judge made extensive findings of fact. (T., pp. 1714-1735). The judge relied upon the lengthy testimony taken from numerous witnesses, exhibits and the court's file which contained the findings of fact and conclusions of her predecessors, Judge Maher and Referee McKnight. (T., pp. 1715). The court as required by MCR 5.974(G) made brief, definite and pertinent findings and conclusions on the contested matters. Judge Barsamian in adopting Judge Maher's findings, essentially found that the respondents could not provide a fit home for the

children given the court's "experience with them relative to the child Samier". (T., p. 1733)."
(Court of Appeals Brief, Page 3)
(emphasis added)

Mr. Ladd also recognized the same issues in his Court of Appeals Brief.

"It is clear from the court's findings that the history of the family's involvement with the court was significant. This consideration was legally proper, given that all proceedings under the Juvenile Code are considered to be one continuous proceeding. In the Matter of Sharpe, 68 Mich App 619 (1976). This earlier history was significant for a number of reasons. First, because it supported the conclusion, made at the adjudication before Judge Maher, that the child Samier Amer had been killed by one of the parents. Second, the history of the case, leading up to the death of the child, demonstrated to the court that certain approaches to therapy could not work with these parents. The court answered an argument made by parents' counsel:"
(Court of Appeals Brief, Page 2)
(emphasis added)

"The United States Supreme Court, in Santosky v. Kramer, 455 US 745, 71 LEd 2d 599; 102 SCt 1388 (1982), mandated that, as a matter of federal constitutional law, a termination of parental rights must be supported by clear and convincing evidence...

"Appellants argue that their due process rights were violated because the Juvenile Court relied on two irrebuttable presumptions in terminating the parents' rights... These facts established that the parents abused and neglected their children. (Adjudication, 10/28/86, 382, 392.) Such findings can reasonably be considered to be findings that the parents home was unfit. See In re Futch, 144 Mich App 163 (1983).

When the case went to hearing on the permanent custody petition, the issue was not whether the death of the child established the parents' continuing lack of fitness, but rather whether the efforts made to rehabilitate the family had been sufficiently successful to render the home safe for the return of the children. (T, 1731-1732)."
(Court of Appeals Brief, Page 15)

Finally, at the oral argument before the Court of Appeals panel on March 6, 1990 Petitioners' argument, and the Court's concern were almost exclusively directed to the due process arguments concerning improper reliance by the Probate Court at the termination hearing on findings made at the earlier hearings where the burden of proof was

preponderance and not clear and convincing evidence. The Respondents also addressed these arguments, conceding that Judge Barsamian had indeed relied on the findings of Judge Maher and Referee McKnight as to the cause of death of Samier. The confession issue was also addressed by counsel and the Court of Appeals panel.

The Court of Appeals entertained, decided and denied each of Petitioners constitutional arguments. Neither adequate state grounds or failure to raise federal questions below bar this Court from determining these questions. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928): Orr v. Orr, 440 U.S. 268, 274-75 (1979); Caldwell v. Mississippi, 472 U.S. 320, 326-328 (1984). See in general, Stern, Gressman, Shapiro Supreme

Court Practice, Sec. 3.22.

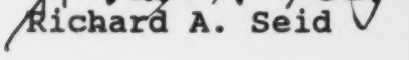
Insofar as Mr. Ladd alludes to the necessity for prompt resolution of the fate of the Amer children, it was the State which caused temporary foster care to exist for 4 years; it was the State judiciary which would not act more promptly despite repeated motions for it do so; and it was Mr. Ladd who asked for two extensions of time within which to file his Court of Appeals Brief.

More importantly, there is no proof before any court that the return of these children to their rightful biological parents would be harmful at all even at this late date. We properly should assume that children are benefitted when returned to their parents. Michigan law does not provide for termination of parental rights in the best interest of children.

Conclusion

This Court has jurisdiction to decide the Constitutional issues raised by the Petition and certiorari should be granted.

Respectfully submitted,



Richard A. Seid

Dated: March 22, 1991